FILE COPY

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 115

KERN-LIMERICK INC., AND UNITED STATES OF AMERICA, APPELLANTS,

vs.

CARL F. PARKER, COMMISSIONER OF REVENUE FOR THE STATE OF ARKANSAS

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

INDEX

[Caption omitted]

IN THE PULASKI CHANCERY COURT

92958

KERN-LIMERICK, INC., PLAINTIFF

vs.

DEAN R. MORLEY, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS, DEFENDANT

PETITION—Filed October 22, 1951

On this day comes the plaintiff and files herewith its petition for an appeal from a certain order issued by the defendant, Commissioner of Revenues for the State of Arkansas, on the 24th day of September, 1951, and for its petition states that it is a domestic corporation organized for the purpose, among other things, of engaging in the general business of selling construction machinery and equipment, and defendant is the duly appointed and acting Commissioner of Revenues for the State of Arkansas; that on December 14, 1950, plaintiff sold and delivered to the United States of America f. o. b. Shumaker, Arkansas, two (2) Allis Chalmers HD-5G Diesel tractors at $8,573.33 each, or for a total price of $17,146.66; that the sale was made upon the purchase order of the Navy Department, Bureau of Yards and Docks by Winston Bros. Company, C. F. Haglin and Sons Co., The Missouri Valley Constructors, Inc., and Solitt Construction Company, Inc., hereinafter referred to collectively as "WHMS", as the purchasing agent for the United States of America and under their contract with the United States of America designated as NOy 23197, copies of said purchase order form and contract being attached hereto, marked Exhibits A and B, respectively, and made a part hereof; that the United States of America and WHMS refused to pay on the said transaction any tax as a gross receipts tax due under the Arkansas Gross Receipts Act of 1941; that on the 11th day of September, 1951, plaintiff filed with the defendant a gross receipts tax return covering the said transaction and tendered under protest the sum of $342.93 demanded and claimed by the defendant to be due as a gross receipts tax on the said transaction; that with the said tender plaintiff made demand in writing for the refund of the said payment and requested the defendant to grant a hearing to determine whether the said transaction is taxable under the provisions of The Arkansas Gross Receipts Act of 1941; that the defendant granted plaintiff's request and held said hearing on the 24th day of

September, 1951; and that upon said hearing defendant issued an order finding that the said transaction is taxable and the tax due under the provisions of the said The Arkansas Gross Receipts Act of 1941, but finding that no penalty should be assessed on account of the said tax. A copy of the said order is attached hereto, marked Exhibit C, and made a part hereof.

Plaintiff further states that the said sale was to the United States of America; that the terms of the said sale provided that the United States of America was obligated to pay to the plaintiff the purchase price upon demand by the plaintiff made upon the United States of America, which demand was to be made by submitting to WHMS, as purchasing agent for the United States of America, its invoice covering the said sale; that plaintiff submitted to WHMS, as such purchasing agent, its invoice for payment of the said purchase price in the sum of $17,146.66; and the said purchase price was paid to plaintiff by WHMS.

Plaintiff alleges (1) that no Arkansas gross receipts tax is due upon the above described transaction for the reason that such sale to the United States of America is exempt from taxation under the provisions of the Arkansas Gross Receipts Act of 1941; (2) that the imposition of a gross receipts tax upon such sale is invalid on the ground that it is repugnant to the Constitution of the United States of America; to-wit: the immunity of the United States of America from taxation by states or political subdivisions thereof; (3) that by imposing a gross receipts tax upon such transaction the defendant has construed and applied The Arkansas Gross Receipts Act of 1941 in a manner which renders that statute invalid under the Constitution of the United States of America.

Wherefore, plaintiff prays that it be granted an appeal from the above described order of the defendant, that the said payment of $342.93 be refunded to it, that it have judgment for its costs herein, and for all other equitable relief.

KERN-LIMERICK, INC.,
ROSE, MEEK, HOUSE, BARRON & NASH,
By (Signed) WILLIAM NASH,
Solicitors for Plaintiff.

[File endorsement omitted.]

(Here follow 2 photos, fols. 6, 7-16)

EXHIBIT "A" to petition

PURCHASE ORDER

NAVY DEPARTMENT
Bureau of Yards and Docks

By: WINSTON BROS. COMPANY
C. F. HAGLIN AND SONS CO.
MISSOURI VALLEY CONSTRUCTORS, INC.
SOLLITT CONSTRUCTION COMPANY, INC.

P. O. BOX 5471 — CAMDEN, ARKANSAS
CONTRACT NCy 33197

....., 19....

PURCHASE ORDER NO.

REQUISITION NO.

Above numbers MUST appear on all invoices, papers and shipments concerning this order.

TO:

Please enter order for items described below in accordance with the conditions, terms and instructions noted on the face and reverse side of this purchase order.

SHIP TO: OFFICER IN CHARGE OF CONSTRUCTION
c/o WINSTON BROS. COMPANY
C. F. HAGLIN AND SONS CO.
MISSOURI VALLEY CONSTRUCTORS, INC.
SOLLITT CONSTRUCTION COMPANY, INC.
SHUMAKER, ARK.

SHIP VIA:

F.O.B.

PAGE 1 OF.....

BILLING CONDITIONS

Invoices must be prepared in duplicate in the name of, and forwarded to, the Purchasing Agent whose name appears on the face of this Purchase Order. State discount terms on invoices. A separate invoice, certified as prescribed by paragraph 14 on reverse side hereof, must be rendered for each shipment. Discount will be based upon the gross amount of invoice unless specifically provided otherwise, and will be calculated from date materials are received at destination or from date and acceptable invoice is received, whichever is later.

MAIL INVOICE, PACKING LIST AND BILL OF LADING ON DAY SHIPMENT IS MADE TO:
WINSTON BROS. COMPANY
C. F. HAGLIN AND SONS CO.
MISSOURI VALLEY CONSTRUCTORS, INC.
SOLLITT CONSTRUCTION COMPANY, INC.
P. O. BOX 5471 — CAMDEN, ARKANSAS

DELIVERY

TERMS

Item No.	DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT

ACCOUNT:.....

APPROVED FOR CONTRACTING OFFICER:

By .....
Officer-in-Charge

WINSTON BROS. COMPANY
C. F. HAGLIN AND SONS CO.
MISSOURI VALLEY CONSTRUCTORS, INC.
SOLLITT CONSTRUCTION COMPANY, INC.
PURCHASING AGENT FOR THE UNITED STATES OF AMERICA

By: .....
Purchasing Agent

NAVDOCKS—PC-[illegible]
(Rev. [illegible])

ORIGINAL: VENDOR

2B

GENERAL PROVISIONS

1. The prime Contractor under the NOy contract referred to on the face of this order as Purchasing Agent is hereinafter referred to as the "Contractor". The United States of America is herein after referred to as the "Government". The term "Secretary of the Navy" includes his duly authorized representatives. The term "Contracting Officer" refers to the Chief of the Bureau of Yards and Docks, Navy Department, and includes his duly authorized representatives. The term "Vendor" refers to the individual, company or corporation named on the face of this order.

2. Vendor shall acknowledge this order promptly and such acknowledgment shall be deemed an acceptance of all the terms and conditions hereof. Vendor shall notify Contractor promptly if shipment will not be made by the date specified.

3. This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price, but the Contractor shall handle all payments hereunder on behalf of the Government. The vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof.

4. Vendor shall make shipment on Government bills of lading or by prepaid or collect commercial bills of lading as elected by the Contractor and stated on the face of this order or subsequently communicated to Vendor.

5. No substitution or changes are to be made by the Vendor in this order without express written authority from the Contractor. The Government (acting through the Contractor or otherwise) may from time to time by written order to the Vendor make changes in the specifications for articles ordered, or the quantities, method, time, or rate of shipment of the same, provided, however, that an equitable adjustment shall be made (by agreement between the Contracting Officer and the Vendor) in the purchase price and other pertinent terms of this order to reflect the effect, if any, of such ordered change on the Vendor's cost of performance hereunder. Claim by Vendor, for any such adjustment shall be deemed waived unless made in writing within 30 days after receipt of the order for the change. Immediate effect shall be given to the ordered change, any dispute as to such equitable adjustment being determined as a question of fact under the "Disputes" clause, paragraph 9 of these General Provisions.

6. Vendor shall not assign this order or any monies due or to become due hereunder without the Contractor's prior written consent.

7. No taxes imposed by any state or political subdivisions thereof on the sale of articles covered by this purchase order are included in the prices stated herein. The prices stated herein do include all applicable Federal Excise Taxes.

8. Vendor guarantees that at the time of delivery thereof the articles provided for under this order will be free from any defects in material or workmanship and will conform to the requirements of this order. Notice of any such defect or nonconformance shall be given to the Vendor within one year of the delivery of the defective or nonconforming article. If required by the Government within a reasonable time after such notice, the Vendor shall promptly correct or replace the defective or nonconforming article or part thereof. If the Government does not require correction or replacement, the Vendor, if required by the Government within a reasonable time after the notice of defect or nonconformance, shall repay such portion of the price of the article as is equitable in the circumstances.

9. Except as otherwise specifically provided in this order, all disputes concerning questions of fact arising under this order shall be decided by the Contracting Officer, whose decision shall be final and conclusive. Pending decision, the Vendor shall diligently proceed with performance.

10. There are incorporated herein by reference (with appropriate substitution therein of "Vendor" for "Contractor"): (a) the "Uniform Termination Article for Fixed Price Supply Contracts" and and the "Contract Article for Termination for Default" prescribed by the Secretary of the Navy as Enclosures (A) (NPD Par 16.205) and (A-13) (NPD Par 11.241a) respectively to his Contract Termination directive No. 1, dated February 28, 1944 and his directive dated January 25, 1945; and (b) the standard patent article prescribed by the Secretary of the Navy in Par 4 of his directive dated October 25, 1945, relating to the patent matters (NPD Par 13.843a). The Vendor shall reserve in all subcontracts or orders relating to this purchase order the right to terminate or cancel such sub contracts or orders upon termination of this purchase order in whole or in part at the option of the Government pursuant to the "Uniform Termination Article for Fixed Price Supply Contracts". Whether or not such right to terminate or cancel such subcontracts or orders upon termination of this for costs arising out of subcontracts or orders relating to this purchase order shall be limited to costs allocable to this purchase order, and shall not include anticipatory profits or other damages resulting from the termination or cancellation of such subcontracts or orders.

11. There are incorporated herein by reference (with appropriate substitution therein of "Vendor" for "Contractor"), the following entitled standard clauses prescribed by the Secretary of the Navy for inclusion in the general provisions in all fixed price supply contracts by his directive dated January 25, 1945: (a) "Inspection" (NPD Par 11.233a); (b) "Responsibility for Articles Tendered" (NPD Par 11.235a); (c) "Walsh-Healey Act" (NPD Par 11.237a); (d) "Overtime Compensation of Laborers and Mechanics" (NPD Par 11.238a); (e) "Nondiscrimination in Employment" (NPD Par 11.243a); (f) "Officials Not to Benefit" (NPD Par 11.240a); (g) "Covenant against Contingent Fees" (NPD Par 11.214a).

12. If the Vendor is required to pay any taxes which by the terms of this order are excluded from the stated price, then the amount of the payment so made shall be added to the stated price, provided, however, that no such taxes shall be paid without first bringing the matter to the attention of the Contracting Officer, and that the directions given by the Contracting Officer with respect to payment of such taxes and action to be taken regarding refund thereof (any refund to inure to the benefit of the Government) shall be strictly followed.

13. Copies of the provisions incorporated by reference under paragraphs 10 and 11 may be obtained from the Contractor.

BILLING INSTRUCTIONS

14. The following certificate must appear on both original and duplicate copy of your invoice and be dated and signed in full, in ink, by a person authorized to act for you. The title of the certifying officer must be indicated:

"I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with; and that the State or local sales taxes are not included in the amounts billed."

By.....

Date..... Title.....

In the event the Contractor is required to pay and does pay State or local sales taxes, the words "and that State or local sales taxes are not included in the amounts billed" should be struck from the certification and the following additional certification added:

"The amount of State or local sales, use, occupational, gross receipts, or other similar taxes or license fees imposed on the Vendor or Vendee by reason of this transaction is $ ..... The Vendor, or Vendee, as the case may be, agrees upon direction of the United States to make appropriate claim for refund and in the event of any refund, to pay the amount thereof to the United States."

7-16

17 EXHIBIT B TO PETITION

NAVDOCKS Form 187, Rev. 1 Sept. 1950

Contract NOy-23197

NEGOTIATED CONTRACT
COST PLUS A FIXED FEE
CONSTRUCTION

WINSTON BROS. COMPANY,
C. F. HAGLIN AND SONS, INC.,
THE MISSOURI VALLEY BRIDGE & IRON CO.,
SOLLITT CONSTRUCTION COMPANY, INC.
(Contractor)

For:

Construction and/or Completion of Facilities

Place:

Naval Ammunition Depot, Shumaker, Arkansas

18 NAVDOCKS Form 187, Rev. 1 Sept. 1950

Contract NOy-23197

NEGOTIATED CONTRACT
COST PLUS A FIXED FEE
CONSTRUCTION

WHMS COMPANY
(Contractor)

DEPARTMENT OF THE NAVY
BUREAU OF YARDS AND DOCKS

Contract for Construction and/or Completion of Facilities.
Place: Naval Ammunition Depot, Shumaker, Arkansas.
Amount (Estimated): $30,800,000.00.

Payments will be made by: Officer in Charge, U. S. Navy Regional Accounts Office, 9th Naval District, Naval Training Center, Great Lakes, Illinois.

19 Table of Contents

Article Title

20 CONTRACT FOR CONSTRUCTION

This negotiated contract, entered into as of the 5th day of October 1950 by the United States of America, hereinafter called the Gov-

ernment, represented by the Chief of the Bureau of Yards and Docks, Department of the Navy, hereinafter called the Contracting Officer, and Winston Bros. Company, a corporation organized and existing under the laws of the State of Minnesota; C. F. Haglin and Sons, Inc., a corporation organized and existing under the laws of the State of Minnesota; The Missouri Valley Bridge & Iron Co., a corporation organized and existing under the laws of the State of Kansas; and Sollitt Construction Company, Inc., a corporation organized and existing under the laws of the State of Indiana; acting jointly, having a central office at 1470 Northwestern Bank Building, Minneapolis, Minnesota, hereinafter called the Contractor, Witnesseth: the parties hereto do mutually agree as follows:

ARTICLE 1.—*Work to Be Done and Fixed Fee.*—(a) The Contractor shall construct or otherwise accomplish the completion of the following public works project or projects at the locations indicated, said project(s) being designated by general titles and the estimated cost being stated to indicate generally the degree of magnitude and not a limit of cost, viz:

NAVAL AMMUNITION DEPOT, SHUMAKER, ARKANSAS

Project No.	Title of Project	
1	Complete the unfinished TNT Line (TNT 1, South Leg)	$ 2,900,000
2	Complete the one partially completed 5" spinner stablizing rocket line	4,345,000
3	Complete the partly finished 11.75" Rocket Line and convert for use in loading 5" and 5.25" Rocket Motors	1,706,000
4	Build 120 Magazine (80 Smokeless Powder, 40 H. E. Magazines)	6,400,000
5	Finish barricaded sidings (10 sidings of 5 car capacity each)	750,000
21		
6	One Supply Warehouse (Approximately 61' x 281')	300,000
7	Complete the B. O. Q. (40 men)	350,000
8	23 Inert Warehouses	1,800,000
9	Cafeteria	754,000
10	Battery Charging Buildings	250,000
11	Complete Laundry for 1000 man capacity	208,000
12	20 Miles of track, including switches, etc.	1,604,000
13	Extension of Utilities	6,633,000
14	Civilian Barracks (500 man)	800,000
15	Procure and/or install production equipment	2,000,000
		$30,800,000

(b) The amount of the fixed-fee is $580,000.00.

(c) The above-mentioned projects designated by general titles may be further indicated by lists of individual projects to be prepared and approved by the Contracting Officer to define with more particularity the scope of the work contemplated by the contract

and such lists may be furnished to the Contractor and be considered to be a part of the contract.

(d) The Contractor shall proceed immediately with the organization of office and field forces to be engaged upon the work under this contract and shall direct his efforts toward early purchases and transportation of materials and the initiation of actual construction work on the site and shall concentrate upon rapid progress and the completion of the entire work at the earliest possible date.

22 PLANS AND SPECIFICATIONS

ARTICLE 2.—(a) The projects indicated in Article 1, as and when accomplished, shall conform to plans and specifications which may be furnished by the Government to the Contractor from time to time during the progress of the work covered by the contract.

(b) The Contractor shall furnish all plans and specifications to supplement those furnished by the Government, which may be determined by the Government, which may be determined by the Officer-in-Charge to be necessary for the accomplishment of the projects. All plans and specifications so furnished by the Contractor shall be subject to approval by the Officer-in-Charge and become the property of the Government.

CHANGES

ARTICLE 3.—The Contracting Officer may at any time, by a written order, make changes in approved drawings and/or specifications within the general scope of the work required under this contract or suspend, omit, or add projects or parts thereof. If such changes or the addition of any project or omission or suspension of any part of portion of the original project cause a material increase or decrease in the amount or character of the work to be done under this contract, an equitable adjustment of the amount of the fixed-fee to be paid to the Contractor shall be made by the Contracting Officer and upon written notice thereof to the Contractor the contract shall be deemed to be modified in writing accordingly. Any claim by the Contractor for modification of such adjustment must be asserted within 30 days from the date he receives such written notice of adjustment; Provided However, that the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 19 hereof. Nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

GOVERNMENT OFFICERS

ARTICLE 4.—(a) The Government will designate an officer of the Civil Engineer Corps, U. S. Navy as "Officer-in-Charge of Construction", herein referred to as "Officer-in-Charge", who, under the direction of the Contracting Officer, shall have complete charge, on behalf of the Government, of the work under this contract in the field.

CONTRACTOR'S ORGANIZATION AND METHODS

A. ARTICLE 5.—(a) The Contractor shall designate a Project Manager or Superintendent who, on behalf of the Contractor shall have complete charge of all work under this contract.

23 (b) The Contractor shall also designate such qualified and experienced engineers as may be required, each of whom, under the direction of the Project Manager shall have charge in the field, on behalf of the Contractor, of such projects or sections or divisions of projects as may be designated by the Contractor.

(c) The Contractor agrees that no representative provided for in this article, nor any other employee occupying a key position in the field organization will be withdrawn or separated from his assignment during the progress of the work except for cogent reasons and after full consultation with the Officer-in-Charge.

(d) Upon the execution of this contract the Contractor shall submit to the Contracting Officer a chart showing the Executive and Administrative personnel to be regularly assigned for full or part time service in connection with the work under the contract, together with a written statement of the duties of each person and the administrative procedure to be followed by the Contractor for the control and direction of the work; and the data so furnished shall be supplemented as additional pertinent data become available. There shall also be submitted to the Contracting Officer by the Contractor charts of the various field organizations showing all personnel, other than artisans, mechanics, helpers and laborers, to be assigned for full or part time service outside the central office organization, together with a written statement of the duties and rates of pay for each person and the procedure proposed to be followed by the Contractor for the accomplishment of all field work, including temporary requirements; and the data so furnished shall be supplemented as additional pertinent data become available.

(e) The Government may award other contracts for work at the site of any work under this contract or may perform work with Government labor and the Contractor shall fully cooperate with any other Contractor and/or Government labor forces and carefully fit his own work to that provided under other contracts or performed by Government labor as may be directed by the Officer-in-Charge. The Contractor shall not commit or permit any act which

will interfere with the performance of work by any other contractor or by Government employees.

SERVICES AND LABOR

ARTICLE 6.—(a) All services and labor, including personal services of every character, except such as may be furnished by the Government, required outside the central office organization of the Contractor for the accomplishment of the work under this Contract shall be furnished by the Contractor. The salaries or compensation paid for services and labor shall be subject to the approval of the Contracting Officer.

(b) No person shall be assigned to service by the Contractor as Superintendent of Construction, Chief Engineer, Chief Pur-
24 chasing Agent, Chief Accountant, or similar position in the field organizations, or as principal assistant to any such person, until his employment has been approved by the Officer-in-Charge. There shall be submitted to the Officer-in-Charge such information as he may request as to the experience, qualifications and former compensation of such persons. Contracts for such services, so far as they shall constitute items of cost to the Government, shall include provisions as to salary or compensation and as to travelling, lodging, subsistence, leaves of absence, and special (if any) allowances, and shall be subject to approval by the Contracting Officer.

(c) The Officer-in-Charge may require the Contractor to dismiss from the work any employee that the Officer-in-Charge deems incompetent, careless, insubordinate, trouble making, or otherwise objectionable.

(d) No persons other than those engaged upon the work under this contract shall be lodged or quartered upon any Naval reservation within which work under the contract is being carried on or be allowed to visit the site of such work except when so authorized by a pass issued by the Officer-in-Charge or superior authorities.

(e) The Contractor shall provide and maintain at the site an efficient and reliable police and guard force, if and as directed by the Officer-in-Charge, for the protection of personnel and property. No person shall be assigned to such force except after approval by the Officer-in-Charge. In the event the site of work to be performed hereunder, as indicated in Article 1, is within the confines of a naval or military activity, all rules and regulations established by the Commanding Officer of the activity relating to the performance of guard and police duties shall be strictly observed.

PLANT AND EQUIPMENT

ARTICLE 7. (a) The Contractor shall provide all plant and equipment required for the accomplishment of the work under this con-

tract except such articles or pieces of equipment as shall be purchased by the Government under the terms of Article 8 hereof or be otherwise furnished by the Government, but no article or piece of equipment costing in excess of $200 shall be purchased and none shall be rented at a rental rate in excess of $100 per month except after prior approval in writing by the Contracting Officer.

(b) The rental compensation for items of plant and equipment owned, or controlled for use hereunder as if owned, by the Contractor shall be calculated on the basis of cost to the Contractor with no allowance for profit. There will be included unless otherwise financed (1) insurance premiums, if any allowed, (2) depreciation, (3) property taxes, (4) interest on investment, (5) general administration and plant expenses. Rental compensation under this paragraph shall be calculated, for the equipment listed therein, in accordance with such Plant and Equipment Cost and Rental Schedule, as may be required and approved by the Contracting Officer. In the case of any other such items of plant and equipment not listed in said schedule but subsequently furnished, rental compensation under this paragraph shall be calculated in the same manner and upon the same basis.

(c) Fifteen percent (15%) will be retained from all rental compensation payable under this article to provide for proper reimbursement on account of possible savings under the arrangement set forth in said schedule.

(d) All equipment shall be delivered to the work in first class working condition. During the progress of the work repairs shall be made as required by the exigencies of the work. At the end of the work, the equipment shall be placed in as good condition as when delivered to the work, minus ordinary wear and tear for which the depreciation allowance noted above is considered to be adequate compensation. The cost of these repairs shall constitute items of cost under the contract.

(e) In calculating payments for plant rentals no deduction from or additions to the normal monthly rates shall be made on account of idle time or shift work, respectively.

(f) In calculating the actual rental costs the total allowance for "depreciation" shall not exceed 50% of the "insurable value" of the equipment when it was delivered to the work.

(g) The Contracting Officer may in his discretion and on behalf of the Government, take possession at any place he may elect of any item of plant or equipment for the purpose of transporting it to the site where it is to be used or held for further disposition and may subsequently return any such item to the posssession of the Contractor for use on the work.

(h) Final disposition of all items of the Government plant and equipment shall be made as directed by the Contracting Officer.

(i) The title of each item of plant and equipment purchased for the Government passes directly from the vendor to the Government as set forth in Article 8 hereof.

(j) The Contractor agrees to use such items of plant and equipment and such shop, storage, transportation, communication, and other facilities owned by the Government as may be available to him and as directed by the Officer-in-Charge.

26 MATERIALS—PURCHASES

ARTICLE 5.8—(a) Except where provision is otherwise made by the Officer-in-Charge, all materials, articles, supplies, and equipment required for the accomplishment of the work under this contract shall be furnished by the Contractor. The Contractor shall act as the purchasing agent of the Government in effecting such procurement and the Government shall be directly liable to the vendors for the purchase price. The exercise of this agency is subject to the obtaining of approval in the instances and in the manner required by subparagraph (c) of this article. The Contractor shall negotiate and administer all such purchases and shall advance all payments therefor unless the Officer-in-Charge shall otherwise direct.

(b) Title to all such materials, articles, supplies and equipment, the cost of which is reimbursable to the Contractor hereunder, shall pass directly from the vendor to the Government without vesting in the Contractor, and such title (except as to property to which the Government has obtained title at an earlier date) shall vest in the Government at the time payment is made therefor by the Government or by the Contractor or upon delivery thereof to the Government or the Contractor, whichever of said events shall first occur. This provision for passage of title shall not relieve the Contractor of any of its duties or obligations under this contract or constitute any waiver of the Government's right to absolute fulfillment of all of the terms hereof.

(c) No purchase in excess of $500 shall be made hereunder without the prior written approval of the Officer-in-Charge, except that the Officer-in-Charge may, in his discretion, either reduce the limitation on the amount of any purchase which may be made without such prior approval or authorize the Contractor to make purchases in amounts not in excess of $2500 for any one purchase without obtaining such prior approval.

(d) No subcontract shall be entered into by the Contractor without the prior written approval of the Officer-in-Charge.

(e) Each cost-plus-a-fixed-fee subcontract shall, unless otherwise directed by the Contracting Officer, provide that the subcontractor shall act as the purchasing agent of the Government to the extent and with the same authority as that specified in subparagraph (a) of this article in regard to such action by the Contractor, and shall

likewise provide that title to purchases for which the subcontractor is entitled to reimbursement shall pass to the Government in the same manner as that specified in subparagraph (b) of this article in regard to purchases for the cost of which the Contractor is entitled to reimbursement.

(f) The Officer-in-Charge may take charge of any materials, articles, supplies, or equipment, procured under this contract for the purpose of transporting them to the site where they are to be used or held for further disposition.

27 (g) Final disposition of excess items furnished hereunder shall be made as directed by the Officer-in-Charge.

LICENSES AND PERMITS

ARTICLE 9.—The Contractor shall determine what permits or licenses are required in connection with the accomplishment of the work under this contract and, with the approval of the Officer-in-Charge, shall take the necessary action to secure the same as required: Provided, That all sites of the work covered by this contract and essential working spaces adjacent thereto which are owned by or under the control of the Government will be made available to the Contractor by the Government. Any such permits or licenses issued by any Federal Government Department or agency will, upon request made by the Contractor, be procured by the Contracting Officer.

COMPENSATION

ARTICLE 10.—(a) The Government, in consideration of the strict performance by the Contractor of his covenants and agreements herein contained, shall pay to the Contractor the sum of the actual net cost, as hereinafter specified and supported by proper documents, paid by the Contractor in accordance with the provisions of this contract in the accomplishment of the work, plus the fixed-fee stated in Article 1(b).

(b) In the aforesaid net cost there shall not be included any cost which is unallowable for reimbursement under the provisions of Part 4, Section XV of the Armed Services Procurement Regulation. Specifically, but without limiting the generality of the foregoing, reimbursement shall not be allowed for any cost of financing the contract, any interest on moneys, any commission, percentage, brokerage or contingent fee within the prohibition of Article 29 hereof, legal, accounting and consulting fees and related expenses except as may be specifically authorized by the Contracting Officer, rent of the regular central offices of the Contractor, services or travelling expenses of any officer or employee included in the central office organization of the Contractor except as may be specifically authorized by the Contracting Officer, regular central office supplies

and equipment or operating expense or any other expense incident to the maintenance and operation of said regular central office organization. In determining the actual net cost of articles and materials of every kind required for the purposes of this contract, there shall be deducted from the gross cost thereof all cash and trade discounts, rebates, allowances, credits, salvage values and commissions which have accrued to the benefit of the Contractor, or would have so accrued except for the fault or neglect of the Contractor. Such benefits lost through no fault of the Contractor shall not be deducted from gross cost. The Contractor shall, to the extent of his ability, take advantage of all such benefits and if unable to do so in any instance, shall promptly notify the Officer-in-Charge in writing to that effect and the reason therefor.

28 (c) It is the general intent and understanding by and between the parties to this contract that the Contractor shall be reimbursed for all out-of-pocket advances and expenditures made by the Contractor incident to the performance of the contract and in accordance with its provisions which are allowable as determined by the Contracting Officer for reimbursement under the provisions of Part 4, Section XV of the Armed Services Procurement Regulation. The term "actual net cost" shall include specifically, but not necessarily exclusively, the following:

(1) The actual net cost paid by the Contractor for all items of plant and equipment purchased by the Contractor for the Government in accordance with Article 8 hereof, with the approval of the Officer-in-Charge and the amount of rental approved by the Contracting Officer for plant and equipment owned or procured by the Contractor under the provisions of Article 7 hereof, for use in connection with the work under this contract, including such insurance, transportation, and other collateral expense, incidental thereto, as the Officer-in-Charge may approve.

(2) The actual net cost to the Contractor of all services, labor, transportation, and subsistence furnished under the provisions of Article 6 hereof, including the cost of hiring, medical examination, transportation, hospitalization, subsistence, leave and holiday pay, advertising as related to "help wanted", and other usual expenses incident to the employment of labor as may be authorized by the Officer-in-Charge.

(3) The actual net cost paid by the Contractor for all materials procured in accordance with the provisions of Article 8 hereof, including purchasing, inspecting, storing, transporting, salvaging, and other usual expenses incident to the procurement and use of materials, as may be authorized by the Officer-in-Charge.

(4) The actual net cost to the Contractor, if any there be, in addition to payments otherwise authorized, of inspections made

under the provisions of Article 16 hereof, reimbursement being limited as therein provided.

(5) The actual net cost to the Contractor, if any there be, in addition to payments otherwise authorized, of changes made under the provisions of Article 3 hereof.

(6) The amount, other than that allocable to the fixed-fee, found due to the Contractor upon settlement in the event this contract is terminated under the provisions of Article 18 hereof.

(7) The actual net cost to the Contractor of any licenses or permits secured by him under the provisions of Article 9 hereof.

(8) The actual net cost to the Contractor, if any there be, in addition to payments otherwise authorized, for any guard or police forces provided by him under the provisions of Article 6 hereof.

29 (9) The actual net cost to the Contractor, if any there be, in addition to payments otherwise authorized, in connection with the keeping of records and books of accounts under the provisions of Article 17 hereof.

(10) The actual net cost to the Contractor of any licenses or royalties furnished or paid by him with the approval of the Contracting Officer.

(11) The actual net cost to the Contractor of the rental and maintenance of any land, space or structures or the erection of structures and/or facilities required for temporary use in connection with the accomplishment of this contract as may be authorized by the Officer-in-Charge and for which payment is not otherwise authorized.

(12) The actual net cost to the Contractor of communication service necessary for the purposes of this contract, including telegrams, telephone service, radio messages, postage, couriers, and other means, as may be authorized by the Officer-in-Charge and for which payment is not otherwise authorized.

(13) The net amount of any U. S. taxes and any state, territorial or local taxes, fees, or charges (except taxes or other exactions imposed upon, by reason of, or measured by the Contractor's fee) which the Contractor may be required, on account of this contract to pay on or for any plant, equipment, process, organization, materials, or personnel, or otherwise on account of the performance of the contract, under any applicable valid law or regulations issued by competent authority. The Contractor shall take such action in respect to protesting and/or suing to recover such taxes or any part thereof as the Contracting Officer may direct.

(14) The actual net cost to the Contractor of liabilities (including expenses incidental thereto) to third persons to the extent that reimbursement is provided in Article 13 hereof.

(15) The actual net cost to the Contractor of insurance to the extent that reimbursement is provided in Article 13 hereof and of

any bonds or special insurance required in connection with this contract by direction or with the approval of the Government.

(16) Any amount found by the Contracting Officer to be due to the Contractor upon settlement after final acceptance of all work accomplished under this contract.

(17) Losses or expenses not compensated by insurance or otherwise (including settlements made with the written consent of the Contracting Officer) actually sustained by the Contractor in connection with the work and found and certified by the Contracting Officer to be just and reasonable and to be reasonably incident to work of the nature and magnitude of that contemplated by this contract, unless reimbursement therefor is especially prohibited by the terms of this contract or is considered unallowable under the provisions of Part 4, Section XV of the Armed Services Procurement Regulation: Provided, That such reimbursement shall not include any amount for which the Contractor would have been indemnified or compensated by insurance except for failure of the Contractor to procure or maintain bonds or insurance in accordance with the requirements of the Government pursuant to the provision of Article 13 of this contract.

Payments

Article 11.—(a) The Contractor may submit to the Officer-in-Charge at intervals of not less than seven calendar days unless otherwise authorized by the Officer-in-Charge, payment requisitions accompanied by duly certified and approved payrolls, paid invoices, paid bills and other substantiating documents, including the Contractor's bill on account of the prescribed fixed-fee, all equaling the amount of the requisition. Payment requisitions covering all items shall be submitted to the Officer-in-Charge. As soon as practicable after the receipt and audit by the Officer-in-Charge of such payment requisition there will be prepared a Public Voucher, in the amount of such requisition as is approved by the Officer-in-Charge, which voucher shall be signed by a duly authorized representative of the Contractor, and thereafter by the Officer-in-Charge, and thereupon transmitted to such Naval Disbursing Officer as may be designated by the Contracting Officer for issuance and delivery of a Government check drawn payable to the order of the Contractor. The Officer-in-Charge shall have the right to defer approval of payments at any time in an amount not to exceed ten percentum of all payments previously made on account of the Contractor's fees if in his judgment such action is necessary to protect properly the interests of the Government.

(b) Subject to the withholding provisions of the preceding paragraph, partial payments on account of the fixed-fee shall be in the same proportion to such fee as payments of reimbursable costs to the

Contractor, plus the value of Government-furnished materials in place, are to the total estimated cost of the work, including the total value of materials to be furnished by the Government, but exclusive of fee.

(c) After payment of eighty percent (80%) of the total estimated cost, further payment shall be withheld until a reserve of not less than $100,000 shall have been set aside, such reserve to be paid to the Contractor at the time of final payment except when otherwise authorized by the Contracting Officer. The Contractor and each assignee under an assignment in effect at the time of final payment shall execute and deliver at the time of and as a condition precedent to final payment, a release in form and substance satisfactory to and containing such exceptions as may be found appropriate by the Contracting Officer, discharging the Government, its officers, agents and employees of and from liabilities, obligations and claims arising under this contract. The estimated cost re-
31 ferred to in the first sentence of this paragraph is the estimated cost exclusive of the estimated amounts of the property to be furnished by the Government (if any) as such estimated amount may be determined or modified from time to time by the Contracting Officer.

Property Loss or Damage

Article 12.—(a) The Contractor is requested not to carry, or incur the expense of any insurance against any form of loss of or damage to equipment or materials furnished by the Government hereunder, or any property to which the Government has taken and continues to hold title hereunder and no reimbursement will be allowed for such insurance premium expenses.

(b) The Government assumes the risk of loss of or damage to such property, whether or not caused by the negligence of the Contractor, his agents, servants, or employees, including expenses incidental to such loss or damage. Notwithstanding the foregoing assumption of risk, the Contractor shall be responsible for any loss or damage for which he is expressly made responsible under any other provision of this contract, or which results from willful misconduct or lack of good faith on the part of any of the Contractor's directors, officers or any of his other representatives having supervision or direction individually or collectively of all or substantially all of the Contractor's operations under this contract.

Liability to Third Persons

Article 13.—(a) The Contractor shall procure and thereafter maintain workmen's compensation, employer's liability, and bodily injury liability insurance, with respect to work done hereunder, and such other liability insurance with respect to such work as the

Contracting Officer may from time to time require or approve. All such insurance shall be in such form, in such amounts, for such periods of time, and with such insurers, as the Contracting Officer may from time to time require or approve.

(b) The Contractor shall be reimbursed (1) for the cost of such insurance of the character described in paragraph (a) of this article as may be required or approved by the Contracting Officer and (2) for liabilities to third persons for loss of or damage to property, death or bodily injury not compensated by insurance or otherwise, arising out of and incurred during the performance of this contract, whether or not caused by the negligence of the Contractor, its agents, servants, or employees, provided such liabilities are represented by final judgments or by settlements approved in writing by the Contracting Officer, and expenses (as authorized by the Contracting Officer), incidental to such liabilities, except liabilities (i) for which the Contractor is otherwise responsible under the express terms of this contract, or (ii) with respect to which the Contractor has failed to insure as required or approved by the Contracting Officer, or (iii) which result from willful misconduct
32 or lack of good faith on the part of any of the Contractor's directors or officers or of any of its other representatives having supervision or direction of all or substantially all of the Contractor's operations under this contract.

Notice of Claims

Article 14.—The Contractor shall give the Contracting Officer immediate notice of any suit or action filed, or any claim made, against the Contractor arising out of the performance of this contract, the cost and expense of which is reimbursable to the Contractor under the provisions of this contract, and the risk of which is then uninsured or in which the amount claimed exceeds the amount of insurance coverage. The Contractor shall furnish immediately to the Contracting Officer copies of all pertinent papers received by the Contractor. If the amount of the liability claimed exceeds the amount of insurance coverage, the Contractor shall authorize representatives of the Government to collaborate with counsel for the insurance carrier, if any, in settling or defending such claim. If the liability is not insured, the Contractor shall, if required by the Contracting Officer, authorize representatives of the Government to settle or defend any such claim and to represent the Contractor in or take charge of any litigation in connection therewith.

Grade of Materials and Workmanship

Article 15.—Unless otherwise authorized by the Officer-in-Charge, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract or provided for tempo-

rary use are to be of the most suitable grade of their respective kinds for the purpose. Where equipment, materials, or articles are referred to in specifications as "equal to" any particular standard, the Contracting Officer shall decide the question of equality. When required by specifications, or when called for by the Officer-in-Charge, the Contractor shall furnish to the Contracting Officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed by the Officer-in-Charge.

INSPECTION

ARTICLE 16.—(a) All materials and workmanship, except as may be otherwise provided herein or otherwise authorized by the Officer-in-Charge, shall be subject to inspection, examination, and test by Government inspectors, or inspectors employed by the Contractor with the approval of the Officer-in-Charge, at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject defective material and workmanship or require its correction. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with the proper material, and the Contractor shall promptly segregate and remove the rejected items from the premises.

33 (b) The Contractor shall furnish promptly all reasonable facilities, labor and materials necessary for the safe and convenient inspection and tests that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to delay the work unnecessarily. Special, full size, and performance tests shall be as specified.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed by removing or tearing out same, the Contractor shall on request of the Officer-in-Charge promptly furnish all necessary facilities, labor, and material for the purpose.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in specifications; and such inspection and acceptance in writing unless otherwise stated in specifications shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding

sentence, the inspection of materials and workmanship for final acceptance as a whole or in part shall be made at the site.

(e) The actual net cost to the Contractor of labor, facilities, and material necessarily incident to the inspections provided in this article including the correction or replacement of defective material and workmanship and of reconstruction, shall be allowed the Contractor as a reimbursable cost, provided, however, that in the event of disclosure of defects resulting from gross negligence or fraud of the Contractor, the cost of the examination and of satisfactory correction, replacement or reconstruction in respect of such defects shall be borne by the Contractor and he is expressly made responsible therefor without right of reimbursement hereunder.

34 RECORDS AND ACCOUNTS

ARTICLE 17.—(a) The Contractor shall keep books, records, documents and other evidence (herein collectively called 'the records') bearing on its costs and expenses under this contract and in respect of any termination of work hereunder. The Contractor's method of accounting shall be in accordance with the Bureau of Yards and Docks 'Manual of Accounting, Auditing, and Control for Negotiated Cost-plus-a-fixed-fee Contracts', subject to such modifications therein as may be authorized or directed by the Contracting Officer.

(b) The Contractor shall furnish to the Department of the Navy upon request such of the records as may be required by the General Accounting Office.

(c) Except for such of the records furnished by the Contractor to the Department of the Navy pursuant to paragraph (b) of this Section and retained by the Department of the Navy, or the General Accounting Office, the Contractor shall preserve the records pertaining to this contract and keep the Contracting Officer advised of the location of such records; provided, however, that if the Contractor, at any time after the lapse of five years following the date upon which final payment under this contract becomes due, desires to dispose of the records, he shall so notify the Contracting Officer, who shall either authorize their destruction to the extent permitted by law or notify the Contractor to turn them over to the Government for disposition and the Contractor shall promptly comply with such notice. The cost of storage and all other charges incidental to the preservation of the records incurred after the completion of this contract as determined by the Officer-in-Charge shall not be reimbursable under the terms of this contract.

(d) The Officer-in-Charge shall at all reasonable times have access to the records pertaining to this contract.

(e) The provisions of this article shall be applicable to and

included in each fixed price adjusted cost or cost-plus-a-fixed-fee contract entered into by the Contractor incident to the performance of this contract.

TERMINATION

ARTICLE 18.—(a) The performance of work under the contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever for any reason the Contracting Officer shall determine that such termination is in the best interests of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying whether termination is for the default of the Contractor or for the convenience of the Government, the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination and except as otherwise directed by the Contracting Officer, the Contractor shall (1) stop work under the contract on the date and to the extent specified in the Notice of Termination; (2) place no further orders or subcontracts for materials, services or facilities except as may be necessary for completion of such portion of the work under the contract as is not terminated; (3) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination; (4) assign to the Government, in the manner and to the extent directed by the Contracting Officer, all of the right, title and interest of the Contractor under the orders or subcontracts so terminated; (5) with the approval or ratification of the Contracting Officer, which approval or ratification shall be final and conclusive for all the purposes of this clause, settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, the cost of which would be reimbursable, in whole or in part, in accordance with the provisions of this contract; (6) transfer title (to the extent that title has not already been transferred) and, in the manner, to the extent and at the times directed by the Contracting Officer, deliver to the Government (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in respect of the performance of, the work terminated by the Notice of Termination, (ii) the completed or partially completed plans, drawings, information and other property which, if the contract had been completed, would be required to be furnished to the Government, and (iii) the jigs, dies, fixtures, and other special tools and tooling acquired or manufactured for the performance of this contract for the cost of which the Contractor has been or will be reimbursed under this contract; (7) use his best efforts to sell in the

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manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in provision (6) of this paragraph, *provided, however,* that the Contractor (i) shall not be required to extend credit to any purchaser, and (ii) may keep any such property at a price or prices approved by the Contracting Officer: and provided further that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be paid in such manner as the Contracting Officer may direct; (8) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and (9) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest. The Contractor shall proceed
36 immediately in the performance of the above obligations, notwithstanding any delay in determining or adjusting the amount of the fixed-fee, or any item of reimbursable cost, under this clause.

(c) The Contracting Officer in his discretion may, and at the request of the Contractor, shall, limit the negotiations for settlement to the fixed-fee, if any, in which event any costs allocable to the terminated portion of the contract shall continue to be presented for payment by the Contractor on prescribed cost vouchers. Promptly upon issuance of the Notice of Termination, the Contracting Officer shall inform the Contractor in writing either: (i) that the settlement will be limited to the fixed-fee; or (ii) that the settlement will include costs and fixed-fee unless the Contractor, within thirty days, requests in writing that they be limited to the fixed-fee.

(d) After receipt of a Notice of Termination and after it has been decided whether or not the settlement is to be limited to the fixed-fee, the Contractor shall submit to the Contracting Officer its termination claim. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination, unless one or more extensions in writing are granted by the Contracting Officer upon request of the Contractor made in writing within such one year period or authorized extension thereof. Upon failure of the Contractor to submit its termination claim within the time allowed, the Contracting Officer shall determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination.

(e) Subject to the provisions of paragraphs (c) and (d), the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by

reason of the total or partial termination of work pursuant to this clause. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount.

(f) In the event of the failure of the Contractor and the Contracting Officer to agree in whole or in part, as provided in paragraph (e) above, as to the amounts with respect to costs and fixed-fee or as to the amount of the fixed-fee, to be paid to the Contractor in connection with the termination of work pursuant to this clause, the Government, but without duplication of any amounts agreed upon in accordance with paragraph (e), shall pay to the Contractor the amounts determined as follows:

(1) *If the settlement includes costs and fixed-fee*

(i) There shall be included therein all costs and expenses reimbursable in accordance with this contract, not previously paid
37 to the Contractor for the performance of this contract prior to the effective date of the Notice of Termination, and such of these costs as may continue for a reasonable time thereafter with the approval of or as directed by the Contracting Officer, provided however, that the Contractor shall proceed as rapidly as practicable to discontinue such costs.

(ii) There shall be included therein the cost, so far as not included under (i) above (which cost may include a reasonable allowance for profit to the subcontractor or vendors, but only on work done in connection with the terminated portion of any subcontract or order), of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (b) (5) above, which are properly chargeable to the terminated portion of the contract, provided that:

(A) Each such claim has been settled with the written approval of the Contracting Officer; or

(B) If a final judgment has been rendered against the Contractor, a subcontractor or vendor by a court of competent jurisdiction determining the liability of the Contractor, subcontractor or vendor with respect to any such claim, the Contracting Officer has determined that such judgment or a part thereof is allocable to the terminated portion of the contract.

In order for a judgment to be allowable under this subparagraph (ii), the Contractor, subcontractor or vendor concerned must have given the Contracting Officer prompt notice of the initiation of the proceedings in which such judgment was rendered and offered in writing to give the Government complete control of the defense of the proceedings, and must have diligently defended the suit, or, if the Government has assumed control of the defense of the proceedings, must have rendered such reasonable assistance as has been

requested by the Government. If such judgment includes
38 amount for loss of anticipatory profits or consequential damages, such amounts will not be allowable under this subparagraph.

(iii) There shall be included therein the reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of termination inventory.

(iv) There shall be included therein a portion of the fixed-fee payable under the contract, determined as follows:

In the event of the termination of this contract for the convenience of the Government there shall be paid a percentage of the fee equivalent to the percentage of the completion of work contemplated by the contract, less fixed-fee payments previously made hereunder.

If the amount determined under this subparagraph is less than the total payment of fixed-fee theretofore made to the Contractor, the Contractor shall repay to the Government the excess amount.

(2) If the settlement includes only the fixed-fee, the amount thereof will be determined in accordance with subparagraph (f) (1) (iv) above.

(g) The Contractor shall have the right of appeal under the clause of this contract entitled "Disputes", from any determination of the amount due to the Contractor made by the Contracting Officer under paragraphs (d) or (f) above, except that if the Contractor has failed to submit its claim within the time provided in paragraph (d) above and has failed to request extension of such time, he shall have no such right of appeal. In any case where the Contracting Officer has made a determination of the amount due under paragraph (d) or (f) above the Government shall pay to the Contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal; any such determination being final and conclusive upon the Contractor and the Government.

39 (h) In arriving at the amount due the Contractor under this clause there shall be deducted (1) all unliquidated advance or other unliquidated payments theretofore made to the Contractor, (2) any claim which the Government may have against the Contractor in connection with this contract, and (3) the agreed price for, or the proceeds of sale of, any materials, supplies or other things kept by the Contractor or sold pursuant to the provisions of

this clause and not otherwise recovered by or credited to the Government.

(i) In the event of a partial termination, the portion of the fixed-fee which is payable with respect to the work under the continued portion of the contract shall be equitably adjusted by agreement between the Contractor and the Contracting Officer, and such adjustment shall be evidenced by an amendment to this contract.

(j) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of the contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6% per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor for a period of five years after final settlement under this contract shall preserve and make available to the Government at all reasonable times at the office of the Contractor, but without expense to the Government, all its books, records, documents, and other evidence bearing on the cost and expenses of the Contractor under this contract and relating to the work terminated, or, to the extent approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions thereof.

Disputes

Article 19.—Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary of his duly authorized representative for the hearing of such appeals shall be final and conclusive; provided, that, if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal.

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Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

MILITARY SECURITY REQUIREMENTS

ARTICLE 20.—(a) The provisions of the following paragraphs of this clause shall apply only if and to the extent that this contract involves access to classified matter, which as used in this clause shall mean information or material classified "Top Secret", "Secret", "Confidential", or "Restricted".

(b) The Contractor (i) shall be responsible for safeguarding all classified matter and shall not supply or disclose classified matter to any unauthorized person, (ii) shall not make or permit to be made any reproductions of classified matter except as may be essential to performance of the contract and shall submit to the Contracting Officer, at such times as the Contracting Officer may direct, an accounting of all reproductions of classified matter, (iii) shall not incorporate in any other project any special features of design or construction which will disclose classified matter, except with the prior written authorization of the Contracting Officer.

(c) Except with the prior written consent of the Secretary or his duly authorized representative, the Contractor (i) shall not permit any alien to have access to classified matter, and (ii) shall not permit any individual to have access to matter classified "Top Secret" or "Secret".

(d) The Contractor agrees (i) to submit immediately to the Contracting Officer a complete confidential report of any information which the Contractor may have concerning existing or threatened espionage, sabotage, or subversive activity, (ii) to submit to the Contracting Officer, upon written request, any and all information which the Contractor may have concerning any of its employees engaged in any work at any plant, factory, or site at which work under this contract is being performed, and (iii) to exclude from its plant, factory, site, or part thereof, at which work under this contract is being performed, any person or persons whom the Secretary or his duly authorized representative, in the interest of security, may designate in writing.

41 (e) The Contractor is authorized to rely on any letter or other written instrument signed by the Contracting Officer, changing or entirely removing the classification of this contract or of any classified matter.

(f) The obligations of the Contractor under this clause shall be in addition to any obligations of the Contractor to comply with all the terms and provisions of any applicable security or secrecy agreement theretofore or hereafter entered into between the Contractor and the Government.

(g) The Contractor agrees to insert, in all subcontracts hereunder which involve access to classified matter, provisions which shall conform substantially to the language of this clause, including this paragraph (g); *provided*, that such provisions need not be included in any subcontract as to which the Contracting Officer shall consent to the omission of such provisions.

TRANSFER OF CONTRACT AND ASSIGNMENT OF CONTRACTOR'S CLAIMS

ARTICLE 21.—(a) Neither this contract, nor any interest herein except as otherwise provided in this article, shall be transferred by the Contractor to any other party or parties.

(b) Pursuant to the provisions of the Assignment of Claims Act of 1940 (Act of October 9, 1940; 31 U. S. Code 203, 41 U. S. Code 15), if this contract provides for payments aggregating $1,000 or more, claims for moneys due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provision of this contract, payment to an assignee of any claim under this contract shall not be subject to reduction or set-off for any indebtedness of the Contractor to the Government arising independently of this contract.

(c) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret", "Secret", "Confidential", or "Restricted", be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same;
provided that a copy of any part or all of this contract so
42 marked may be furnished, or any information contained
therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

DAVIS-BACON ACT

ARTICLE 22.—This contract, to the extent that it is of a character specified in the Davis-Bacon Act as amended (40 U. S. Code 276a), is subject to all provisions and exceptions of said Davis-Bacon Act, including in particular the following:

(a) The Contractor and his subcontractors shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subse-

quent deductions or rebate on any account (except such pay-roll deductions as are permitted by applicable regulations prescribed by the Secretary of Labor), the full amounts accrued at time of payment computed at wage rates not less than those stated in the Exhibit "A", regardless of any contractual relationship which may be alleged to exist between the Contractor or subcontractor and such laborers and mechanics; and the scale or wages to be paid shall be posted by the Contractor in a prominent and easily accessible place at the site of the work.

(b) The Contracting Officer shall have the right to withhold from the Contractor so much of accrued payments as may be considered necessary by the Contracting Officer to pay to laborers and mechanics employed on the work the difference between (i) the rates of wages required by the contract to be paid laborers and mechanics on the work and (ii) the rates of wages received by such laborers and mechanics and not refunded to the Contractor, subcontractors, or their agents.

(c) In the event it is found by the Contracting Officer that any laborer or mechanic employed by the Contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Contracting Officer may (i) by written notice to the Contractor, terminate his right to proceed with the work, or such part of the work as to which there has been a failure to pay said required wages, and (ii) prosecute the work to completion by contract or otherwise, whereupon the Contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

42a EIGHT-HOUR LAW

ARTICLE 23.—This contract, to the extent that it is of a character specified in the Eight-Hour Law of 1912 as amended (40 U. S. Code 324-326) and is not covered by the Walsh-Healey Public Contracts Act (41 U. S. Code 35-45), is subject to the following provisions and exceptions of said Eight-Hour Law of 1912 as amended, and to all other provisions and exceptions of said Law:

No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of the said work, shall be required or permitted to work more than eight hours, in any one calendar day upon such work, except upon the condition that compensation is paid to such laborer or mechanic in accordance with the provisions of this clause. The wages of every such laborer and mechanic employed by the Contractor or any subcontractor engaged in the performance of this contract shall be computed on a basic day rate of eight hours per day; and work in excess of eight hours per day is permitted only

upon the condition that every such laborer and mechanic shall be compensated for all hours worked in excess of eight hours per day at not less than one and one-half times the basic rate of pay. For each violation of the requirements of this clause a penalty of five dollars shall be imposed upon the Contractor for each such laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than eight hours upon said work without receiving compensation computed in accordance with this clause; and all penalties thus imposed shall be withheld for the use and benefit of the Government.

CONVICT LABOR

ARTICLE 24.—In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

NON-DISCRIMINATION IN EMPLOYMENT

ARTICLE 25.—In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, creed, color, or national origin; and further agrees to insert the foregoing provision in all subcontracts hereunder except subcontracts for standard commercial supplies or for raw materials.

43 COPELAND ACT

ARTICLE 26.—To the extent that this contract is of a character specified in the Copeland ("Anti-Kickback") Act as amended (18 U. S. Code 874 and 40 U. S. Code 276c), the Contractor agrees to comply with the regulations, rulings, and interpretations of the Secretary of Labor pursuant to said Copeland Act, which Act makes it unlawful to induce any person employed in the construction or repair of public buildings or public works to give up any part of the compensation to which he is entitled under his contract of employment; and the Contractor agrees to insert a like provision in all subcontracts hereunder.

LABOR STATISTICS

ARTICLE 27.—The Contractor shall report, and shall by agreement require his subcontractors to report, at such times, in such manner, and covering such matters as the Officer-in-Charge may direct, such labor statistics, applicable only to work performed under this contract at the site of the work, as may be required for transmittal to the Department of Labor.

OFFICIALS NOT TO BENEFIT

ARTICLE 28.—No member of or delegate to Congress, or resident commissioner, shall be admitted to any share or part of this contract,

or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

Covenant Against Contingent Fees

Article 29.—The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

Buy-American Act

Article 30.—The Contractor agrees that in the performance of the work under this contract the Contractor, subcontractors, material men and suppliers shall use only such unmanufactured articles, materials and supplies (which term "articles, materials and supplies" is hereinafter referred to in this clause as "supplies") as have been mined or produced in the United States, and only such manufactured supplies as have been manufactured in the United States
44 substantially all from supplies mined, produced, or manufactured, as the case may be, in the United States. Pursuant to the Buy-American Act (41 U. S. Code 10 a-d), the foregoing provisions shall not apply (i) with respect to supplies excepted by the Secretary from the application of that Act, (ii) with respect to supplies for use outside the United States, or (iii) with respect to the supplies to be used in the performance of work under this contract which are of a class or kind determined by the Secretary or his duly authorized representative not to be mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or (iv) with respect to such supplies, from which the supplies to be used in the performance of work under this contract are manufactured, as are of a class or kind determined by the Secretary or his duly authorized representative not to be mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality provided that this exception (iv) shall not permit the use in the performance of work under this contract of supplies manufactured outside the United States if such supplies are manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

Renegotiation

Article 31.—(a) This contract is subject to the Renegotiation Act of 1948.

(b) The Contractor (which term as used in this clause means the party contracting to furnish the articles or perform the work required by this contract) agrees, within thirty days after receipt of its signed copy of this contract, to notify the Military Renegotiation Policy and Review Board, Office of the Secretary of Defense, Washington 25, D. C., of such contract, indicating its own name and address; provided that, if the Contractor has previously reported to the Military Renegotiation Policy and Review Board any contract or purchase order subject to the Renegotiation Act of 1948, such notification shall not be necessary.

(c) The Contractor agrees to insert the provisions of this clause, including this paragraph (c), in all contracts or purchase orders in excess of $1,000 to make or furnish any article or to perform all or any part of the work required for the performance of this contract; provided, that the Contractor shall not be required to insert the provisions of this clause in any contract or purchase order of a class or type described in subsection (i)(1) of the Renegotiation Act of February 25, 1944, as amended, or in any contract or purchase order of a class or type which has been exempted by the Secretary of Defense or by the Military Renegotiation Policy and Review Board.

Patent Indemnity

Article 32.—(a). The Contractor shall hold and save the Government, its officers, agents, servants, and employees, harmless from patent liability of any nature or kind, including costs and expenses, for or on account of any patented or unpatented invention made or used in the performance of this contract, including the use or disposal thereof by or on behalf of the Government: Provided, That the foregoing shall not apply to inventions covered by applications for United States Letters Patent which, on the date of execution of this contract, are being maintained in secrecy under the provisions of Title 35, U. S. Code (1940 ed.) Section 42, as amended; Provided further, That this Article is not, and shall not be construed to be, applicable to any infringement of United States Letters Patent which results from the Contractor's complying with specific written instructions furnished by the Government, or where infringement is occasioned by the use of an apparatus patent due to the fabrication, installation, or operation of apparatus in accordance with plans and specifications furnished to the Contractor by the Government.

(b) The Contractor shall promptly notify the Government in writing of any and all claims of infringement relating to this contract that may be brought to the Contractor's attention and in case of litigation on account thereof, the Contractor shall assist the Government at the latter's expense, save for services of the Contractor's employees, in furnishing such evidence as to the use of the patents and other matters of fact as may be required by the Government in such litigation.

AUTHORIZATION AND CONSENT FOR USE OF PATENTS

ARTICLE 33.—The Government hereby gives its authorization and consent (without prejudice to its rights of indemnification, if such rights are provided for in this contract) for all use and manufacture, in the performance of this contract or any part hereof or any amendment hereto or any subcontract hereunder (including any lower-tier subcontract, of any patented invention (i) embodied in the structure or composition of any article the delivery of
46 which is accepted by the Government under this contract, or (ii) utilized in the machinery, tools or methods the use of which necessarily results from compliance by the Contractor or the using subcontractor with (a) specifications or written provisions now or hereafter forming a part of this contract, or (b) specific written instructions given by the Contracting Officer directing the manner of performance.

NOTICE AND ASSISTANCE REGARDING PATENT INFRINGEMENT

ARTICLE 34.—(a) The Contractor agrees to report to the Contracting Officer, promptly and in reasonable written detail, each claim of patent infringement based on the performance of this contract and asserted against it, or against any of its subcontractors if it has notice thereof.

(b) In the event of litigation against the Government on account of any claim of infringement arising out of the performance of this contract or out of the use of any supplies furnished or construction work performed hereunder, the Contractor agrees that it will furnish to the Government upon request, all evidence and information in its possession pertaining to the defense of such litigation. Such information shall be furnished at the expense of the Government except in those cases in which the Contractor has agreed to indemnify the Government against the claim being asserted.

COMPLIANCE

ARTICLE 35.—The failure of the Government, in any one or more instances, to insist upon strict performance of any of the terms of this contract or to exercise any option herein conferred, shall not

be construed as a waiver or relinquishment for the future of any such terms or options.

COMPOSITION OF CONTRACTOR

ARTICLE 36.—If the term "Contractor" as used herein includes more than one legal entity, then each entity so included shall be jointly and severally liable for the undertakings of the Contractor hereunder. Plant or equipment owned directly or indirectly by any one or combination of such entities shall be considered as owned by the Contractor for the purposes of the provisions of this contract.

SUPERSEDURE

ARTICLE 37.—If this contract has been preceded by a Letter or Dispatch of Intent or a Notice of Award, anticipating the execution of this contract, then such Letter or Dispatch or Notice and all rights and obligations of the parties thereunder are superseded
47 and merged into this contract. All acts of the Contractor and the Government and all payments, if any, made by the Government under said Letter or Disptach or Notice shall be deemed to have been under this contract.

DEFINITIONS

ARTICLE 38.—(a) The term "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department of the Navy and the head or any assistant head of the executive agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the Secretary.

(b) The term "Contracting Officer" means the person executing this contract on behalf of the Government, and any other officer or civilian employee who is a properly designated Contracting Officer; and the term includes, except as otherwise provided in this contract, the authorized representative of a Contracting Officer acting within the limits of his authority.

(c) The term "Officer-in-Charge" as used in this contract shall include the duly appointed successor of such designated officer and likewise any person or persons authorized by notice in writing to the Contractor to act for him or his successor.

ALTERATIONS

ARTICLE 39.—The following changes were made in the form text of this contract before the contract was executed by the parties hereto.

(a) Notwithstanding the provisions of Articles 1 and 10, when the amounts payable to the Contractor under this contract (including a fee equitably adjusted pursuant to Article 3) have equaled

BLURRED COPY

the funds appropriated and allotted to this contract, the Contractor shall not be required to continue performance under this contract unless and until this contract is amended to increase the funds appropriated and allotted thereto. Until such amendment, the amounts payable hereunder shall not exceed the funds so appropriated and allotted and the payment of any additional amounts shall be subject to the availability and limitation of appropriations.

(b) Exhibit "A" is attached hereto and made a part hereof.

48 AUTHORITY

ARTICLE 40.—This contract is entered into under authority of Sections 2(c)(10) and 4(b) of Public Law 413, 80th Congress, (Armed Services Procurement Act of 1947), and any required determination and findings with respect thereto have been made.

IN WITNESS WHEREOF, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF AMERICA,

By (S.) B. O. ROESSLER,
Civil Engineer Corps, U.S.N., For Chief of Bureau of Yards and Docks, Department of the Navy.

CONTRACTOR:
WINSTON BROS. COMPANY,
By (S.) W. J. ROHAN, *President;*
C. F. HAGLIN AND SONS, INC.,
By (S.) C. F. HAGLIN, *President;*
THE MISSOURI VALLEY BRIDGE & IRON CO.,
By (S.) H. S. TULLOCK, *President;*
SOLLITT CONSTRUCTION COMPANY, INC.,
By (S.) A. A. FULLER, *Vice-Pres.,*
1470 Northwestern Bank Bldg.,
Minneapolis 2, Minn.
(Business address)

The cost of this contract is chargeable to 17X1205, "Public Works (new) Navy", for $11,000,000; Expenditure Account Class No. 48200.

49 CORPORATE CERTIFICATE

I, F. B. Winston, certify that I am the secretary of the corporation named as Contractor herein; that W. J. Rohan who signed this contract on behalf of the Contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL.] (S.) F. B. WINSTON.

I, Ada J. Palmer, certify that I am the secretary of the corporation named as Contractor herein; that C. F. Haglin who signed this contract on behalf of the Contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL.] (S.) ADA J. PALMER.

I, C. F. Greever, certify that I am the secretary of the corporation named as Contractor herein; that H. S. Tullock who signed this contract on behalf of the Contractor, was then President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL.] (S.) C. F. GREEVER.

I, Aloys A. Goeller, certify that I am the ass't secretary of the corporation named as Contractor herein; that A. A. Fuller who signed this contract on behalf of the Contractor, was then Vice-President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

[CORPORATE SEAL.] (S.) ALOYS A. GOELLER.

50 EXHIBIT "A"

	Per Hour
Air tool op. (jackhammermens, vibrator)	$ 1.20
Asbestos Workers	2.375
Asbestos Workers Improvers	
1st year	1.30
2nd year	1.55
3rd year	1.65
4th year	1.75
Boilermakers	2.375
Boilermakers' helpers	2.125
Bricklayers	2.92
Carpenters	1.75
Cement finishers	2.00
Electricians	2.25
" apprentices	
1st 6 months optional	
2nd " " 40% of journeymen's rate	
3rd " " 45% " " "	
4th " " 50% " " "	
5th " " 55% " " "	
6th " " 60% " " "	
7th " " 65% " " "	
8th " " 75% " " "	

	Per Hour
Glaziers	1.625
Iron workers, structural	2.125
Iron Workers, ornamental	2.125
Iron workers, reinforcing	1.875
Laborers, building	1.00
Laborers, concrete	1.00
Laborers, unskilled	1.00
Mason tenders	1.25
Mortar mixers	1.25
Painters, brush	1.625
Painters, spray	2.25
Painters, structural steel	2.00
Piledrivermen	1.75
Plasterers	2.50
Plasterers' tenders	1.25
Plumbers	2.375
Power equipment operators:	
Air compressor, one	1.50
" " two	1.75
Bulldozer	2.00
Sideboom	2.00
Cranes, derricks, draglines	2.25
Carry-alls	2.00
Central mixing plants	1.75
Distributor (bituminous surfaces)	1.75
Ditching machines	1.75
Earth drills	1.75
51 Elevating grader	1.75
Finishing machine	1.75
Firemen and oilers	1.25
Motor cranes, driver oiler	1.50
Hoists, 1 drum	1.75
" 2 or more drums	2.00
Loading machine	1.75
Mixer, mobile	1.75
" smaller than 10-S	1.75
" larger than 10-S	2.00
Motor patrols	2.00
Pavers	2.00
Pumpcrete	1.75
Pumps, smaller than 5"	1.50
" larger than 5"	1.75
Push cats	1.75
Rollers	1.75
" asphalt	1.75
" sheep foot	1.50

	Per Hour
Tournapulls	2.125
Scale operators	1.50
Shovels	2.25
Scrapers	2.00
Trenching machines	2.00
Well driller	1.50
Snatch cat	1.50
Roofers, composition	1.61
Sheet metal workers	1.75
Soft floor layers	1.625
Stone masons	2.92
Truck drivers:	
Trucks under 1½ tons	1.10
Stake body or flat bed	1.25
Semi trailer	1.40
Dump or batch truck	1.40
Winch trucks	1.65
Ready mix	1.55
Helper or swamper	1.15

52 EXHIBIT "C" TO PETITION

THE STATE OF ARKANSAS, BY DEAN R. MORLEY, AS COMMISSIONER OF REVENUES, PLAINTIFF

vs.

KERN-LIMERICK, INCORPORATED, DEFENDANT

ORDER

On this the 24th day of September, 1951, a hearing was held by me at my office in the Capitol Building, in the City of Little Rock, in accordance with the provisions of Act No. 386 of the Acts of 1941, better known as the Arkansas Gross Receipts Act, after due notice was given as provided by said Act, and after hearing the evidence adduced I find that there is due the State of Arkansas the sum of $342.93 as Gross Receipts tax by the above named defendant for the period beginning December 1, 1950, to December 31, 1950, inclusive.

It is therefore ordered that said delinquent sales tax be collected togther with a penalty of None percent of the total amount of said tax, and with interest thereon at the rate of one-half of one percent per month from the date said tax became delinquent, on the 20th day of January, 1951, together with all costs incurred in the collection of said tax, hereafter. The total amount of tax is $342.93.

Given under my hand as Commissioner of Revenues for the State of Arkansas, on the day and year first above mentioned.

(Signed) D. R. MORLEY,
Commissioner of Revenues for the State of Arkansas.

53 IN THE PULASKI CHANCERY COURT

[Title omitted]

RESPONSE TO PETITION—Filed October 25, 1951

Comes, Dean R. Morley, as Commissioner of Revenues for the State of Arkansas, defendant herein, and for his response to the Petition of the plaintiff states:

Admits that the plaintiff is engaged in the general business of selling construction machinery and equipment in this State, and that the defendant is the duly appointed and acting Commissioner of Revenues;

Admits that on November 15, 1950 plaintiff sold and delivered two (2) Allis Chalmers Diesel tractors for the sum of $17,146.66 but denies that the same were sold to the United States of America f.o.b. Shumaker, Arkansas but states the facts to be that the sale was made to the contractors engaged in the construction of said war plant and that payment therefor was made by said contractors and not by the United States Government;

Defendant further answering denies that said contractors are purchasing agents for the United States of America, but states the facts to be that said contractors are engaged for the purpose of building, constructing and operating certain portions of said war plant and that any purchases made by them are made for the purpose of carrying out their contract with the United States Government in the construction and operation of said plant and that said contractors are consumers under the law of this State and that the attempt by the Agents of the United States Government to designate said contractors as such agents of the United States Government is a subterfuge and intended for the purpose to evade the payment of Gross Receipts Tax due this State;

Admits that the United States of America and "WHMS" refused to pay the amount of tax due on the above described purchases and that on September 11, 1951, the plaintiff filed with the defendant a Gross Receipts Tax Return showing due thereon the sum of
54 $342.93, that the same was filed and paid under protest as provided by law and that a hearing was had before the Commissioner and that the Commissioner issued his written order on September 24, 1951, finding that said tax was due, and that in due time the plaintiff has caused an appeal to be filed to this Court as provided by law and therefore denies each and every other allegation contained and set out in plaintiff's petition.

WHEREFORE, Defendant prays that plaintiff's petition be dismissed and that an Order and Decree of this Court be entered in

favor of the defendant for the payment of said tax together with all costs herein expended and for other proper and equitable relief.

(Signed) O. T. WARD,
Attorney for Defendant.

[File endorsement omitted.]

55 IN THE PULASKI CHANCERY COURT

[Title omitted]

INTERVENING PETITION OF UNITED STATES—Filed April 16, 1952

Petition of The United States for leave to intervene and intervening petition.

The United States of America, by its attorneys, Ellis N. Slack, Acting Assistant Attorney General of the United States, and Berryman Green, Special Assistant to the Attorney General, respectfully alleges that it has a real and substantial interest in the matter in litigation and therefore desires to become a party to the litigation by uniting with the plaintiff in the obtaining of the relief sought in this action for the use and benefit of the United States, and as grounds therefor alleges:

I

That the intervention for which leave is prayed herein is authorized by the Attorney General of the United States and is at the request of the Department of the Navy.

II

That the intervenor adopts and incorporates herein by reference all of the allegations and conclusions contained in the plaintiff's petition herein.

III

That by reason of the facts so alleged, your petitioner has an interest in this cause which it is entitled to protect by intervention herein. Wherefore, your petitioner, United States of America, respectfully prays that leave be granted to it to intervene in this cause; that an order be entered allowing intervention; and that this petition for leave to intervene be considered and adopted by this Court as the intervening petition of the United States.

56 Your petitioner further prays that the judgment prayed for by the plaintiff in its petition be entered and that the Court grant such other and further relief as it may deem proper.

UNITED STATES OF AMERICA,
By ELLIS N. SLACK,
Acting Assistant Attorney General.
(Signed) BERRYMAN GREEN,
Special Assistant to the Attorney General.

APRIL, 1952

[File endorsement omitted.]

57 IN THE PULASKI CHANCERY COURT

KERN-LIMERICK, INC., PLAINTIFF

vs.

DEAN R. MORLEY, AS COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS, DEFENDANT, AND THE UNITED STATES OF AMERICA, INTERVENOR

ANSWER TO PETITION FOR INTERVENTION—Filed April 23, 1952

Comes Carl F. Parker, as Commissioner of Revenues for the State of Arkanass, successor to Dean R. Morley, former Commissioner, and for his response and answer to the Petition of Intervenor states:

Denies that the United States of America has any rightful interest in the questions involved herein, and

Denies that it is a proper party to the determination of the questions here involved, and therefore

Denies each and every allegation contained and set out in said Intervention and prays as in the original answer filed herein.

(Signed) O. T. WARD,
Attorney for Defendant.

[File endorsement omitted.]

58 IN THE PULASKI CHANCERY COURT

[Title omitted]

STIPULATION OF FACTS

It is stipulated by Counsel for the parties hereto that the United States of America (hereinafter called the "Government") under authority of Section 2(c)(10) and 4(b) of Public Law 413, 80th Congress (Armed Services Procurement Act of 1947), entered into a contract with Winston Bros. Company, C. F. Haglin and Sons Co., Missouri Valley Constructors, Inc., and Sollitt Construction Company, Inc., (hereinafter called "Prime Contractor") for the construction and/or completion of the Naval Ammunition Depot at Shumaker, Arkansas, which contract is designated Contract No. NOy-23197 and a copy of which contract was attached to the petition filed herein and made an exhibit thereto.

It is further stipulated that the procedure by which a purchase of material and equipment is made in connection with the construction and/or completion of the said Naval Ammunition Depot under the provisions of this said contract is substantially as follows:

1. *Purchase Requests.* All requests for material and equipment to be purchased for use (or for services performed) in connection

with the said construction originate from the Prime Contractor from one of three sources:

a. Engineering Department for basic construction components including equipment for temporary and permanent structures.

b. Field Superintendent for construction equipment, tools and supplies.

c. Department Manager for office supplies and equipment and operating supplies.

59 Such request is made on a form designated "Purchase Request" (NavDocks FC-201). A copy of this form marked Exhibit A is attached hereto.

This form is executed in quadruplicate.

One copy is retained by the department of the Prime Contractor originating the request.

The other three copies are transmitted to the Office Engineer of the Prime Contractor who reviews for adequacy and sufficiency and assigns a serial number and a cost code number. The numbers are inscribed in the blank provided in the upper right hand corner of the form.

The Office Engineer retains one copy.

The remaining two copies are transmitted to the Purchasing Department of the Prime Contractor. The Purchasing Department of the Prime Contractor registers the Purchase Request by the serial number assigned to the request and transmits both copies to the Navy Technical Division, T-100, under the Officer-in-Charge of Construction (hereinafter called O in CC), presently Comdr. G. M. Gans (CEC) USN, acting for the contracting officer as set forth in paragraph 4 hereof. This is the first instance in which the Purchase Request comes to the attention of the Government.

The Navy Technical Division checks the Purchase Request and determines the necessity of the purchase and the conformance of the items requested with required specifications. In the event this Division determines that the request is incorrect or irregular, it so marks the forms and returns them to the Prime Contractor which resubmits the request to the source from which it originated. This Division does in fact on occasion determine a request to be unnecessary and returns it. In the event this Division determines that the items requested do not conform to the required specifications, this determination is noted and the request is returned to the Prime Contractor for its reconsideration. In the event this
60 Division determines that the items requested are necessary and conform to the required specifications, "Approval for Purchase" is noted on the forms for the O in CC and both copies are returned to the Purchasing Department of the Prime Contractor.

2. *Request for Bids.* When the two copies of the Purchase Request are approved and returned by the Navy Technical Division to the Purchasing Department of the Prime Contractor, the Purchasing Department of the Prime Contractor prepares a request for bids on a form designated "Request for Bids" (Form FC-202 (Y&D)). This form is prepared in quadruplicate and carries the serial number assigned to the Purchase Request by the Office Engineer of the Prime Contractor.

The form so prepared describes the items to be purchased and provides blanks for the prices to be quoted therefor. One copy of the form is retained in the Purchasing Department of the Prime Contractor and three copies together with a sheet of standard instructions to bidders are mailed to a suitable list of possible vendors.

A copy of the form "Request for Bids" marked Exhibit B and a copy of the instructions to bidders marked Exhibit B-1 are attached hereto.

The bidder returns a copy of the form completed to show the prices quoted by the bidder.

The bids are opened at the designated time by the Prime Contractor in the presence of two representatives of the O in CC and are initialed by the representative of the Prime Contractor and the two representatives of the O in CC present at the opening of the bids.

For a purchase in an amount less than $500, bids therefor may be taken by letter or occasionally by telephone, and the only difference in the procedure as heretofore outlined is that such bids are handled directly by the Purchasing Department of the Prime Contractor. The Purchase Request is submitted to and passed upon by the Navy Technical Division as herein described and, except for the manner in which bids are taken, the procedure herein described is otherwise the same as for purchases in amounts more than $500.00.

61 3. *Bid Comparison Sheet.* All bids received by the Prime Contractor for purchases in connection with the performance of the above mentioned contract are recorded on a form designated "Bid Comparison" (NavDocks FC-203). This procedure is followed whether the bids are taken on the regular form "Request for Bids" or by letter or by telephone. The Bid Comparison Sheet is prepared in duplicate and carries the serial number assigned to the Purchase Request.

A copy of this form is marked Exhibit C and attached hereto.

4. *Purchase.* The representatives of the Prime Contractor and the two representatives of the O in CC recommend the awarding of the contract to the lowest acceptable bidder, and for that pur-

pose a purchase contract is prepared. This purchase order is on a form designated "Purchase Order" (NavDocks FC-204).

A copy of this form marked Exhibit D is attached hereto.

The form bears the serial number previously assigned to the Purchase Request and is made up from the Bid Comparison Sheets. The Purchase Order is executed by the Prime Contractor with the designation that it is the Purchasing Agent for the United States of America and is approved by the O in CC for the Contracting Officer, defined in the Request for Bids to be the Chief of the Bureau of Yards and Docks, Navy Department.

This Purchase Order is prepared in seven copies for ultimate distribution as follows:

1. Original to the vendor.
2. Prime Contractor's Accounting Department.
3. Navy Auditing Division.
4. Purchasing Department of the Prime Contractor.
5. Prime Contractor's material control (Receiving Department).
6. Navy Auditing Division.
7. Purchasing Department of the Prime Contractor.

The original, and the duplicate, triplicate and sixth copies of the purchaser Order, together with the original Bid Comparison, the originals of all bids, and a copy of the Purchase Request, are transmitted to the Navy Technical Division. This Division,
62 acting for the O in CC, examines these instruments to determine that the Purchase Order, the Bid Comparison, and the bids comply with the Purchase Request previously approved by the Division as necessary and in conformity with required specifications.

In the event of any discrepancy or in the event the purchase is found to be unnecessary, or if for any other reason the Purchase Order is disapproved, all instruments are returned to the Prime Contractor.

In the event the Navy Technical Division approves these instruments, all of the said instruments are then transmitted to the Navy Auditing Division which in turn checks all instruments.

At this point of the procedure, there must be funds previously appropriated by the Congress of the United States of America set aside and available for this specific Purchase Order. If such funds have not been appropriated and set aside for this specific Purchase Order, then the Prime Contractor is not required to proceed and does not proceed to consummate the Purchase Order until such funds have been so appropriated and set aside.

After these instruments have been checked and approved by the Navy Auditing Department, it then transmits these same instruments to the O in CC for approval or disapproval. As a gen-

eral rule he does approve; however, he may change, reject, or void the Purchase Order.

When the O in CC has approved the Purchase Order, the Navy Auditing Division retains the triplicate copy of the Purchase Order, the original of all bids, the original Bid Comparison, a copy of the Purchase Request, and the sixth copy of the Purchase Order. It returns the original and a duplicate copy of the Purchase Order only to the Purchasing Department of the Prime Contractor.

Up to this point, the successful bidder has not been notified that his bid has been accepted.

When the Purchasing Department of the Prime Contractor receives the original and duplicate copies of the Purchase Order fully executed by the Prime Contractor and approved by
63 the O in CC, the Prime Contractor mails the original Purchase Order to the vendor and retains the duplicate copy in its Accounting Department. At the same time it retains the fifth copy of the Purchase Order in its Receiving Department.

After the Purchasing Department of the Prime Contractor mails the original Purchase Order to the vendor, the fourth copy of the Purchase Order is placed in its "open order" file, together with a copy of all Requests for Bids, a copy of the Bid Comparison Sheet, and the original Purchase Request.

The seventh copy of the Purchase Order is retained by the Purchasing Department and placed in its "commodity classification" file.

5. *Change in Purchase Order.* In the event that it becomes necessary, for any reason, to make a change on a Purchase Order after release to the vendor, such change is made on a form designated "Purchase Change Order" (Form FC-212).

A copy of this form marked Exhibit E is attached hereto.

This Purchase Change Order is originated in the Purchasing Department of the Prime Contractor in the same number of copies as the Purchase Order, carries the serial number assigned to the Purchase Request and is executed, approved, and distributed in the same manner as the Purchase Order itself as heretofore described.

6. *Material Control.* The vendor makes shipment to the O in CC, in care of the Prime Contractor, Shumaker, Arkansas.

The shipment is received at the material receiving station on the grounds of the Naval Ammunition Depot at Shumaker, Arkansas. Upon the arrival of the shipment, notice thereof is given to a representative of the Government designated as a Navy Inspector. No material is received or inspected unless and until a Navy Inspector is present. When a Navy Inspector and a checker for the Prime Contractor are both present, the shipment is checked and the items counted and listed on a form designated as "Receiving and Inspection Report" (NavDocks FC-205).

64 A copy of this form marked Exhibit F is attached hereto.

This form carries the same serial number assigned to the Purchase Request covered by the shipment and is prepared in triplicate. It is prepared on the basis of the joint inspection and count by the Navy Inspector and the checker of the Prime Contractor and is signed by the Prime Contractor's Receiving Clerk and by the Navy Inspector. Any exception to and rejections of material are attested to jointly by the checker for the Prime Contractor and the Navy Inspector.

Distribution of this instrument is as follows:

1. The original goes to the Navy Auditing Division.
2. The duplicate goes to the Accounting Department of the Prime Contractor.
3. The triplicate copy goes to the Receiving Department of the Prime Contractor.

In the event that any material is rejected after inspection and count by the Navy Inspector and the checker for the Prime Contractor, the material so rejected is listed on a form designated "Material Rejection Report" (form FC-208 (Y&D)).

A copy of this form marked Exhibit G is attached hereto.

This Material Rejection Report carries the serial number assigned to the Purchasing Request covered by the shipment and is signed jointly by the Navy Inspector and the Materials Clerk of the Prime Contractor and is executed in quadruplicate.

Distribution, in lieu of that appearing on the form which to that extent has been changed, is as follows:

1. The original goes to the Navy Auditing Division.
2. The duplicate copy goes to the Accounting Department of the Prime Contractor.
3. The triplicate copy goes to the Purchasing Department of the Prime Contractor.
4. The fourth copy is placed in the receiving file of the Prime Contractor.

65 If the item purchased is equipment, the procedure is essentially the same as that described above. All equipment is subject to inspection by the Navy Inspector of the Equipment Division, and the acceptance or rejection of the equipment is subject to a joint check by the Prime Contractor and the Navy Inspector. Receipt of equipment is noted on a form designated "Individual Equipment Receiving and Inspection Report" (NavDocks FC-501).

A copy of the form marked Exhibit H is attached hereto.

This form carries the same serial number assigned to the Purchase Request covered by the shipment and is signed by the Receiving Clerk of the Prime Contractor and the Navy Inspector and is dis-

tributed as designated on the form. If equipment is rejected, such rejection is noted by the preparation and signing of a Material Rejection Report in the same manner as above described.

7. *Accounting.* The vendor's invoice is submitted to the Accounting Department of the Prime Contractor. There the invoice is matched with a duplicate Receiving and Inspection Report signed by a Navy Inspector and the Prime Contractor's Receiving Clerk. The invoice and the duplicate Receiving and Inspection Report are then matched with the duplicate Purchase Order (and duplicate Purchase Change Order where applicable.)

If the invoice covers equipment, the invoice is matched with a duplicate Individual Equipment Receiving and Inspection Report and duplicate Purchase Order (and duplicate Purchase Change Order where applicable).

The vendor's invoice is then audited with the Purchase Order (and Purchase Change Order where applicable), the duplicate Receiving and Inspection Report, and duplicate Individual Equipment Receiving and Inspection Report, where applicable, inclusive of but not limited to the following items:

1. Item numbers.
2. Description of items.
3. Quantities.

66 4. Units.

5. Unit Prices.
6. Amount.
7. Discount terms.
8. Shipping f.o.b. terms.
9. Deletion of taxes imposed by the state or political subdivisions thereof.

After the vendor's invoice has been audited in this manner, then the invoice, freight bills, and delivery tickets are attached to an Accounts Payable Voucher.

A copy of this form (NavDocks FC-403) marked Exhibit I is attached hereto.

The form is completed, executed and distributed as indicated.

When the vendor's invoice has been checked and the Accounts Payable Voucher has been prepared and checked, the Voucher is approved by the Chief Accountant or delegated Chief Auditor of the Prime Contractor.

When the Accounts Payable Voucher has been approved by the Chief Accountant of the Prime Contractor, it is transmitted to the Disbursing Agent of the Prime Contractor who in turn draws a check on the disbursing account. This disbursing account is a fund provided and maintained by the Prime Contractor. The check is signed by the Chief Accountant and countersigned by the Controller for the Prime Contractor and then mailed to the vendor.

The cancelled check is then returned by the vendor's bank to the Accounting Department of the Prime Contractor. The stub receipt form attached to the check signed by the vendor is detached from the check, and the original vendor's invoice covered by the signed stub receipt and the stub receipt are stapled together and posted in triplicate on a Transmitted Summary.

A copy of this form (NavDocks FC-411) marked Exhibit J is attached hereto.

67 The accounting thus far has been done solely by the Prime Contractor.

The original and duplicate copies of the Transmittal Summary and attachments consisting of vendor's original invoice and signed stub receipt are then transmitted to the Navy Auditing Division for approval of reimbursement.

The Navy Auditor audits the Transmittal Summary by referring to original copies of all bids, original Bid Comparison, the triplicate copy of the Purchase Order, and original Receiving and Inspection Report and original Individual Equipment Receiving and Inspection Report where applicable, covering each invoice listed on the Transmittal Summary. If he finds the Transmittal Summary in order, the Navy Auditor stamps the duplicate copy as "Approved" for the O in CC to indicate that the items listed thereon are approved for government reimbursement to the Prime Contractor and returns this duplicate to the Prime Contractor.

Government Form 1034 Reimbursement Voucher is then prepared by the Navy Auditing Division for certification by the Prime Contractor for approval by the O in CC under Contract No. NOy-23197, which approval is indicated by his signature thereon. This instrument is then mailed to the Navy Regional Accounts Officer at the Great Lakes Naval Station.

The Navy Regional Accounts Officer then draws a check on the Treasury of the United States of America against the funds allocated for Contract No. NOy-23197 for the Prime Contractor and forwards said check to the Prime Contractor's bank for deposit to its account.

8. *Cost-Plus-a-Fixed-Fee Sub-Contractors.* The procedure and forms for purchases made through the Cost-Plus-A-Fixed-Fee Sub-Contractors are identical with the procedure and forms as thus described, except that the purchase orders of these sub-contractors are transmitted through the office of the Purchasing Department

68-69 of the Prime Contractor for its preliminary approval to the O in CC for approval instead of being transmitted directly to the O in CC. These cost-plus-a-fixed-fee sub-contractors are C. Wallace Plumbing Company and Fischbach & Moore of Texas, Inc.

It is further stipulated that Exhibit K, attached hereto, is a chart which shows graphically the procedure as herein described.

It is further stipulated that Exhibit L, attached hereto, is a photostatic record of the actual transaction in issue.

It is further stipulated that the general procedure hereinabove described is required by the Government and the several forms in connection therewith are prepared by the Government and their use is mandatory.

It is further stipulated that the exhibits marked Exhibits M and N, respectively, attached hereto, are true and correct copies of contracts between the Prime Contractor and Cost-Plus-A-Fixed-Fee Sub-Contractors, C. Wallace Plumbing Company and Fischbach & Moore of Texas, Inc.

(Here follow 2 photos, fols. 70, 71-73)

EXHIBIT "B" to stipulation

(Y&D)
15)

T FOR BID

BUREAU OF YARDS AND DOCKS
NAVY DEPARTMENT
BY: WINSTON BROS. COMPANY
C. F. HAGLIN AND SONS CO.
MISSOURI VALLEY CONSTRUCTORS, INC.
SOLLITT CONSTRUCTION COMPANY, INC.
PURCHASING AGENT
Camden P. O. Box 9471 Arkansas
CONTRACT NOy 33197

EXHIBIT "B" to stipulation

REQUEST FOR BID No
DA...
BY
PRICES TO BE IN OUR HANDS NOT LATER THAN:

RETURN TO PURCHASING DEPT.

ATTENTION

OTE HEREIN, SUBJECT TO CONDITIONS ON REVERSE SIDE, YOUR LOWEST PRICE FOR THE FOLLOWING MATERIAL TO BE
ED F. O. B.
FOR PACKING OR DRAYAGE OR FOR ANY OTHER PURPOSE WILL BE ALLOWED OVER AND ABOVE THE PRICE QUOTED ON
ET.
IS RESERVED TO ACCEPT OR REJECT QUOTATION ON EACH ITEM SEPARATELY OR AS A WHOLE.
TO BID, PLEASE RETURN THIS REQUEST WITH REASON STATED HEREON.

(SIGNATURE OF PURCHASING AGENT)

DESCRIPTION	QUANTITY	UNIT	UNIT PRICE	AMOUNT	
					THIS IS NOT AN ORDER

TOTAL AMOUNT OF FREIGHT INCLUDED IN ABOVE: $ (TO BE USED AS DEDUCTION FROM YOUR INVOICE IN EVENT "SHIPMENT COLLECT ON GOVERNMENT B/L" IS SPECIFIED IN OUR PURCHASE ORDER)

TOTAL

SIGNED
BY
DATE

TANCE TO

70

46B

GENERAL PROVISIONS

1. The prime Contractor under the NOy contract referred to on the face of this order as Purchasing Agent is hereinafter referred to as the "Contractor". The United States of America is hereinafter referred to as the "Government". The term "Secretary of the Navy" includes his duly authorized representatives. The term "Contracting Officer" refers to the Chief of the Bureau of Yards and Docks, Navy Department, and includes his duly authorized representatives. The term "Vendor" refers to the individual, company or corporation named on the face of this order.

2. Vendor shall acknowledge this order promptly and such acknowledgment shall be deemed an acceptance of all the terms and conditions hereof. Vendor shall notify Contractor promptly if shipment will not be made by the date specified.

3. This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price, but the Contractor shall handle all payments hereunder on behalf of the Government. The vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof.

4. Vendor shall make shipment on Government bills of lading or by prepaid or collect commercial bills of lading as elected by the Contractor and stated on the face of this order or subsequently communicated to Vendor.

5. No substitution or changes are to be made by the Vendor in this order without express written authority from the Contractor. The Government (acting through the Contractor or otherwise) may from time to time by written order to the Vendor make changes in the specifications for articles ordered, or the quantities, method, time, or rate of shipment of the same, provided, however, that an equitable adjustment shall be made (by agreement between the Contracting Officer and the Vendor) in the purchase price and other pertinent terms of this order to reflect the effect, if any, of such ordered change on the Vendor's cost of performance hereunder. Claim by Vendor, for any such adjustment shall be deemed waived unless made in writing within 30 days after receipt of the order for the change. Immediate effect shall be given to the ordered change, any dispute as to such equitable adjustment being determined as a question of fact under the "Disputes" clause, paragraph 9 of these General Provisions.

6. Vendor shall not assign this order or any monies due or to become due hereunder without the Contractor's prior written consent.

7. No taxes imposed by any state or political subdivisions thereof on the sale of articles covered by this purchase order are included in the prices stated herein. The prices stated herein do include all applicable Federal Excise Taxes.

8. Vendor guarantees that at the time of delivery thereof the articles provided for under this order will be free from any defects in material or workmanship and will conform to the requirements of this order. Notice of any such defect or nonconformance shall be given to the Vendor within one year of the delivery of the defective or nonconforming article. If required by the Government within a reasonable time after such notice, the Vendor shall promptly correct or replace the defective or nonconforming article or part thereof. If the Government does not require correction or replacement, the Vendor, if required by the Government within a reasonable time after the notice of defect or nonconformance, shall repay such portion of the price of the article as is equitable in the circumstances.

9. Except as otherwise specifically provided in this order, all disputes concerning questions of fact arising under this order shall be decided by the Contracting Officer, whose decision shall be final and conclusive. Pending decision, the Vendor shall diligently proceed with performance.

10. There are incorporated herein by reference (with appropriate substitution therein of "Vendor" for "Contractor"): (a) the "Uniform Termination Article for Fixed Price Supply Contracts" and and the "Contract Article for Termination for Default" prescribed by the Secretary of the Navy as Enclosures (A) (NPD Par 16.305) and (A-13) (NPD Par 11.241a) respectively to his Contract Termination directive No. 1, dated February 28, 1944 and his directive dated January 25, 1946; and (b) the standard patent article prescribed by the Secretary of the Navy in Par 4 of his directive dated October 25, 1945, relating to the patent matters (NPD Par 13.842a). The Vendor shall reserve in all subcontracts or orders relating to this purchase order the right to terminate or cancel such sub contracts or orders upon termination of this purchase order in whole or in part at the option of the Government pursuant to the "Uniform Termination Article for Fixed Price Supply Contracts". Whether or not such right to terminate or cancel such subcontracts or orders upon termination of this for costs arising out of subcontracts or orders relating to this purchase order shall be limited to costs allocable to this purchase order, and shall not include anticipatory profits or other damages resulting from the termination or cancellation of such subcontracts or orders.

11. There are incorporated herein by reference (with appropriate substitution therein of "Vendor" for "Contractor"), the following entitled standard clauses prescribed by the Secretary of the Navy for inclusion in the general provisions in all fixed price supply contracts by his directive dated January 25, 1944: (a) "Inspection" (NPD Par 11.233a); (b) "Responsibility for Articles Tendered" (NPD Par 11.238a); (c) "Walsh-Healey Act" (NPD Par 11.237a); (d) "Overtime Compensation of Laborers and Mechanics" (NPD Par 11.239a); (d) "Nondiscrimination in Employment" (NPD Par 11.243a); (f) "Officials Not to Benefit" (NPD Par 11.245a); (g) "Covenant against Contingent Fees" (NPD Par 11.274a).

12. If the Vendor is required to pay any taxes which by the terms of this order are excluded from the stated price, then the amount of the payment so made shall be added to the stated price, provided, however, that no such taxes shall be paid without first bringing the matter to the attention of the Contracting Officer, and that the directions given by the Contracting Officer with respect to payment of such taxes and action to be taken regarding refund thereof (any refund to inure to the benefit of the Government) shall be strictly followed.

13. Copies of the provisions incorporated by reference under paragraphs 10 and 11 may be obtained from the Contractor.

BILLING INSTRUCTIONS

14. The following certificate must appear on both original and duplicate copy of your invoice and be dated and signed in full, in ink, by a person authorized to act for you. The title of the certifying officer must be indicated:

"I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with; and that the State or local sales taxes are not included in the amounts billed."

By_____

Date_____ Title_____

In the event the Contractor is required to pay and does pay State or local sales taxes, the words "and that State or local sales taxes are not included in the amounts billed" should be struck from the certification and the following additional certification added:

"The amount of State or local sales, use, occupational, gross receipts, or other similar taxes or license fees imposed on the Vendor or Vendee by reason of this transaction is $_____. The Vendor, or Vendee, as the case may be, agrees upon direction of the United States to make appropriate claim for refund and in the event of any refund, to pay the amount thereof to the United States."

15. RENEGOTIATION

(a) This contract is subject to the Renegotiation Act of 1948.

(b) The Contractor (which terms as used in this clause means the party contracting to furnish the articles or perform the work required by this contract) agrees, within thirty days after receipt of its signed copy of this contract, to notify the Military Renegotiation Policy and Review Board, Office of the Secretary of Defense, Washington 25, D. C., of such contract, indicating its own name and address; provided that, if the Contractor has previously reported to the Military Renegotiation Policy and Review Board any contract or purchase order subject to the Renegotiation Act of 1948, such notification shall not be necessary.

(c) The Contractor agrees to insert the provisions of this clause, including this paragraph (c), in all contracts or purchase orders in excess of $1,000 to make or furnish any article or to perform all or any part of the work required for the performance of this Contract; provided, that the Contractor shall not be required to insert the provisions of this clause in any Contract or purchase order of a class or type described in subsection (i) (1) of the Renegotiation Act of February 25, 1944, as amended, or in any Contract or purchase order of a class or type which has been exempted by the Secretary of Defense or by the Military Renegotiation Policy and Review Board.

74-204 EXHIBIT B-1 TO STIPULATION

INSTRUCTIONS TO BIDDERS

1. Use the forms provided, showing unit prices, extension thereon, and total. In case of error in extension, unit price shall govern.
2. Where applicable, indicate brand, make, model, size, etc., of item on which you are bidding.
3. Return the *white* and *pink* copies, both identically filled out.
4. Use the return envelope provided.
5. Use the typewriter or ink in filling out bid forms.
6. Sign the white and pink copies in ink, including company name and signature of an authorized person, with title designated.
7. If additional sheets are required, or a cover letter is written, they must be in *duplicate*, both copies signed and identified by bid number.
8. If a larger envelope is required, paste the regular envelope on it for address and identification.
9. If corrections are made, they must be initialed by person signing bid.
10. Do not neglect to show terms, delivery and date through which bid is to stand for acceptance.
11. If f.o.b. point is not indicated by us, be sure to note change.
12. Do not neglect to show amount of freight included.
13. Be sure you have read conditions at the head of this form and those on reverse hereof.
14. Mail bid in time to reach us on date indicated as one on which prices must be in our hands.

Failure to adhere to these instructions may constitute an informality in the bid.

205 IN THE PULASKI CHANCERY COURT

92958

KERN-LIMERICK, INC., PLAINTIFF

v.

DEAN R. MORLEY, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS, DEFENDANT

THE UNITED STATES OF AMERICA, INTERVENOR

DECREE

On this day appeared the plaintiff, Kern-Limerick, Inc., by its Solicitors, Rose, Meek, House, Barron & Naxh, the defendant, Carl

F. Parker, Commissioner of Revenues for the State of Arkansas, by its Solicitor, O. T. Ward, and the Intervenor, United States of America, by its Solicitor, Berryman Green, and upon a showing that Dean R. Morley is no longer the Commissioner of Revenues for the State of Arkansas and oral motion of O. T. Ward, the cause of action is hereby revived in the name of and against Carl F. Parker, presently the Commissioner of Revenues for the State of Arkansas and successor to Dean R. Morley; and all parties hereto announcing ready for trial, this cause is submitted to the Court upon the petition of Kern-Limerick, Inc., with its exhibits, the response of the defendant thereto, the intervening petition of the United States of America, the answer of the defendant thereto, stipulation of counsel with its exhibits filed herein, and argument of counsel; and the Court being well and sufficiently advised as to all matters of fact and law arising herein, doth find that on December 14, 1950, the plaintiff sold and delivered to the United States of America, f.o.b. Shumaker, Arkansas, two (2) Allis-Chalmers HD-50 Diesel tractors for $8,573.33 each, or for a total price of $17,146.66; that the sale was made upon the purchase order of the Navy Department, Bureau of Yards and Docks, by Winston Bros. Company, C. F. Haglin and Sons Co., The Missouri Valley Constructors, Inc., and Sollitt Construction Company, Inc., as the purchasing agent for the United States of America, and under their contract with the United States of America, designated as NOy-23197; that the United States of America and Winston Bros. Company, C. F. Haglin and Sons Co., The Missouri Valley Constructors, Inc., and Sollitt Construction Company, Inc., refused to pay on the said transaction any
206 tax as a gross receipts tax due under The Arkansas Gross Receipts Act of 1941; that on the 11th day of September, 1951, plaintiff filed with the defendant a gross receipts tax return covering the said transaction and tendered under protest the sum of $342.93 demanded and claimed by the defendant to be due as a gross receipts tax on the said transaction; that with the said tender plaintiff made demand in writing for a refund of the said payment and requested the defendant to grant a hearing to determine whether the said transaction is taxable under the provisions of The Arkansas Gross Receipts Act of 1941; that the defendant granted plaintiff's request and held said hearing on the 24th day of September, 1951; that upon said hearing the defendant issued an order finding that the said transaction is taxable and the tax due under the provisions of the said The Arkansas Gross Receipts Act of 1941, but further finding that no penalty should be assessed on account of said tax; that the plaintiff within proper time filed its petition for a refund; and that the United States of America properly intervened herein and is a proper party to this action.

The Court doth further find that the said sale by the plaintiff is a

sale to the United States Government and is exempt from taxation under the provisions of The Gross Receipts Act of 1941; that the imposition of the gross receipts tax upon said sale is repugnant to the Constitution of the United States of America in that it violates the immunity of the United States of America from taxation by states or political subdivisions thereof; and that by imposing a gross receipts tax upon the said transaction the defendant has construed and applied The Arkansas Gross Receipts Act of 1941 in a manner which renders that statute invalid under the Constitution of the United States of America.

It is, therefore, by the Court considered, ordered, adjudged and decreed that the plaintiff recover from the defendant the sum of $342.93, togther with its costs herein expended.

207 The defendant objects to the findings of the Court and its order granting relief to the plaintiff, and prays an appeal, which appeal is hereby granted.

This order having been granted on the 23rd day of April, 1952, but omitted from the record, is ordered to be entered now for them.

May 14, 1952.

208 Clerk's Certificate to foregoing transcript omitted in printing.

209 IN SUPREME COURT OF ARKANSAS

OPINION—Filed May 21, 1953

The United States of America, through and on behalf of the Navy Department, entered into a written contract (designated as NOy-23197) with Winston Bros. Company, C. F. Haglin and Sons Company, Missouri Valley Contractors, Inc., and Sollitt Construction Company, Inc. (hereinafter referred to as WHMS) to construct a Naval Ammunition Depot at Shumaker, Arkansas, the total cost of which was approximated at $30,800,000.00. By the terms of the contract of employment WHMS was to procure all labor, supplies, materials, etc., necessary for constructing and equipping said depot and pay for the same, and the Government was to reimburse WHMS for all such expenditures and pay them, in addition, the sum of $580,000.00 for their services as contractors. The type of contract referred to is designated and is generally known as a "Cost-Plus-a-Fixed-Fee Contract." Other provisions of the contract will be specifically mentioned later.

The question herein to be decided arose in the manner presently set forth. On December 14, 1950 Kern-Limerick, Inc., a machinery and equipment company of Little Rock, Arkansas, sold to WHMS (as contended by appellant) or to the United States (as contended by the latter) two diesel tractors for a total price of $17,146.66, and

the tractors were delivered at the site of construction at Shumaker, Arkansas. The Revenue Commissioner for the State of Arkansas demanded payment from Kern-Limerick, Inc. in the sum of $342.93 as a 2% tax on the sale price pursuant to the provisions of the Arkansas Gross Receipts Act of 1941. Payment of the tax was made under protest by Kern-Limerick, Inc., and later suit was filed in the Chancery Court of Pulaski County, Arkansas for the recovery of the amount so paid. The United States intervened in this suit, contending that the sale in question was a sale to it and that consequently no tax was collectible thereon by the State of Arkansas. The Chancery Court held with the contention of
210 the United States and the Commissioner of Revenues for the State of Arkansas has appealed to this Court for a reversal.

The 1941 Gross Receipts Act, referred to before, provides that no tax shall be paid on sales to the United States; therefore, the question confronting this Court is whether the sale in question was made to WHMS or to the United States. To answer this question it is necessary to examine the provisions of the contract between WHMS and the United States and to do so in the light of court decisions relating thereto.

In order to obtain the savings in money and time that may reasonably be expected by the negotiation of a cost-plus contract such as the one here involved, it is obvious that the U. S. Government must maintain, and so the contract must provide, effective control over all purchases by the contractor; otherwise, the Government could not be assured it would receive standard materials and services at the lowest possible prices. Therefore, as would be expected, the United States in this case wrote into its contract with WHMS provisions for strict control of all purchases of labor, materials, and equipment which were to be used in or for the construction of the Ammunition Depot.

Contract. Some of the pertinent provisions were: (a) All applications for purchases, all bids, and all purchases must be made on Government (Navy) forms and all must be approved by an Officer in Charge who was an officer representing the Navy Department; (b) After approval WHMS consummated the transaction by paying the purchase price and taking delivery at the site of construction at Shumaker, Arkansas; (c) Upon presentation of the evidences of purchase and upon a showing that all requirements had been complied with, the purchase price paid, and delivery made, the Government would reimburse WHMS. Before reimbursement it must also appear that the Government had appropriated money for that purpose; (d) Title to the property so purchased never vested in WHMS but did vest in the United States; (e) WHMS was acting as purchasing agent for the United States in negotiating all purchases; (f) The United States was obligated to the vendor to pay the purchase

price; and (g) The vendor was to make demand for payment
211 by submitting an invoice to WHMS.

Some of the terms of the contract, including those designated (e), (f) and (g) above, were printed on the back of all "Request for Bids" and "Purchase Order" blanks which went to prospective vendors.

Arkansas Statute. That tax sought to be imposed herein by the Arkansas Revenue Commissioner is levied by Act No. 386 of 1941, which specifies a tax of 2% (*Ark. Stats.* 84-1903) upon the gross proceeds derived from all sales, and requires the vendor (*Ark. Stats.* 84-1908) to pay the tax to the Commissioner. Some other pertinent provisions of said Act No. 386 are set out below.

(1) *Ark. Stats.* 84-1902 (c):

> Sale: The term 'sale' is hereby declared to mean the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished.

(2) *Ark. Stats.* 84-1902 (i):

> Consumer-User: The term 'consumer' or 'user' means the person to whom the taxable sale is made, or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this Act.

(3) *Ark. Stats.* 84-1903 (e)—last paragraph:

> Sales of service and tangible personal property including materials, supplies and equipment made to contractors who use same in the performance of any contract are hereby declared to be sales to consumers or users and not sales for resale.

As has been previously stated, the vital question is: Who was the "purchaser" in this instance? Was it WHMS or the United States? It is conceded that if it was the former the tax is collectible, and if it was the latter the tax is not collectible. The opinion of the United States Supreme Court in the case of *Alabama* v. *King and Boozer* (which will be cited later), in which this same question was under consideration, contains this language: "Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority." Giving a reason-

able interpretation to the language of the Arkansas Gross
212 Receipts Act as it is set out in sub-paragraphs above (1) defining a Sale, (2) defining Consumer-User, and (3) relating to contractors, and having in mind all the provisions of the contract between WHMS and the United States, we are of the opinion that WHMS was the "purchaser" in this instance and that consequently Kern-Limerick, Inc. is liable to the Commissioner for the tax on the two tractors which it sold.

Notwithstanding the above, however, it is obvious that the State of Arkansas could not arbitrarily define WHMS as the "purchaser" and thereby impose a tax on the United States Government if in fact and in truth the latter was the purchaser in this instance, and so we will proceed to consider the question from that standpoint after making this further observation. In determining whether or not the State of Arkansas has acted arbitrarily in enacting this particular Act with the language it contains depends on whether the Act is discriminatory, and, particularly, in this instance, whether it discriminates against the United States. The opinion referred to above recognizes this test and makes it clear that the mere fact that the tax is eventually passed on to the Federal Government is no indication it is discriminatory or that it violates the immunity of the Government. In our opinion the Arkansas Statute meets all the tests.

Was the United States the Purchaser? In coming to the conclusion that the United States was not, in this instance, the "purchaser", we base our decision primarily on the opinion in the case of *Alabama v. King and Boozer*, 314 U.S. 1, decided in 1941. The question for decision in that case was the same as presented here and was based on facts, with the exceptions later noted, very similar to the facts of this case. The opinion which overruled some former decisions and approved others is comprehensive and logical and appears to be a landmark case on the issue involved. It upheld the imposition of a sales tax by an Alabama Statute on the sale of lumber by King and Boozer to a cost-plus-a-fixed-fee contractor who was engaged in constructing a project for the Government pursuant to a contract
presently to be mentioned.

213 For the sake of brevity it suffices for this opinion to say that the Government contract in the *King and Boozer* case was like the contract here with the same provisions and regulations except three on which the intervenor relies to distinguish the two cases. The three exceptions referred to are: (a) In the cited case the contractor was liable to the vendor for the purchase price while here the contract provides the Government shall be liable; (b) Here the contract designates the contractor (WHMS) as Purchasing Agent for the Government, while in the cited case no such provision appears in the contract; and (c) Here the contract provides that title

to any purchased article vests immediately in the Government while in the cited case it vested in the Government upon delivery at the site of construction and approval by the Government.

It is our judgment that the distinguishing features set out above are more synthetic than real and that they do not justify a conclusion here different from that reached in the *King and Boozer* opinion.

(a) Appellees lay great stress on the fact that here the Government has obligated itself to pay the vendor and that this indicates the Government was the real purchaser, and say that this feature, which was lacking in the *King and Boozer* case, was a necessary element to sustain the opinion. The cited opinion does contain this phrase: "It is equally plain that they (the contractors) did not assume to bind the Government to pay for the lumber . . ." We are not convinced that the court attached the same importance to this feature as appellees do, but we are convinced that there is actually no real difference. Under the terms of the contract here it is hard to see how the credit of the Government could be pledged to the vendor. In the process of buying the tractors the Government (through the Navy Officer in Charge) checked every step in detail. When the sale was finally made the tractors were paid for by WHMS, delivered to the site of construction, and again checked and inspected by the agent. Only then and after WHMS proved to the Government's satisfaction that the purchase price had been paid by WHMS to Kern-Limerick, Inc., did the Govern-
214 ment reimburse WHMS. We are convinced that this provision pledging the credit of the Government was not placed in the contract because of any necessity to further protect the interest of the Government, but for another purpose, and maybe considered redundant. We understand appellees do not seriously deny this provision was inserted to avoid the effect of the decision in the *King and Boozer* case. Granting the propriety of such purpose, we do not think it effective.

(b) *WHMS as Purchasing Agent.* Much of what was said above applies to this provision of the contract and especially as to the possible purpose of its insertion. Actually, the contractor in the *King and Boozer* case acted as effectively as an agent for the Government as WHMS does under the contract in this case. However, in neither case do we deem it proper to speak of the contractor as an "agent" because in each instance he was a contractor (an independent contractor) and was so designated in the contract of employment. Whether WHMS could be legally made an agent for the purpose of making purchases for the Government in this instance will be later discussed.

(c) *Title in the Government.* The fact that under the terms of the contract title to the tractors never rested in WHMS also, as we

view the entire case, fails to distinguish this case from the *King and Boozer* case. There the title to the lumber rested in the contractor only until the lumber was delivered and paid for and then title automatically vested in the Government. The practical result was the same in both instances and we are unwilling to say that the legal fiction of divesting WHMS of title momentarily here has any significant bearing on the immunity of the United States from taxation. By no process of reasoning can we see how such a provision was necessary to better protect the interest of the Government, and we again conclude it must have been devised for another purpose.

Before the decision in the *King and Boozer* case Congress had refused to exempt from taxation purchases made by cost-plus contractors in constructing projects for the Government. Since the decision an attempt to evade its effect was made by proposed legislation in the Congress, but, after exhaustive hearings, Con-
215 gress refused to sanction such enactment. In view of this definite attitude on the part of the Government itself, we think any attempt to reach a different result by skillful legal phraseology should be cautiously considered. We recognize the supremacy of the Government in the field of taxation and the urgency of the need for funds by both the State and Federal Governments, but where the interests of the two conflict, it is necessary to have a division line with due respect for both. This idea is well expressed, in the opinion referred to, in this language:

> So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties.

Armed Services Procurement Act of 1947. This Act of Congress will be referred to by sections as it appears in *USCA.*, Volume 41, page 189, Title 41, beginning with Section 151. In some way, appellees urge, this Act strengthens their contention that the United States was the actual purchaser in this instance. Their theory seems to be that the Act gives direct authority to the Navy Department to make purchases for its own use and purposes, that this authority can be delegated to an agent, and that such delegation was made in this instance to WHMS. We do not agree with this interpretation of the Act.

As we see it, the over-all purpose of this Procurement Act was to empower the Navy Department (as well as the Army, Air Force and Coast Guard) to purchase (or contract to purchase) supplies or services for its own *use*, as stated in Section 151. Considering, without holding, the Act authorized the Navy Department to buy an Ammunition Dump at Shumaker, Arkansas (had one been in

existence) for its use, it does not follow that the Navy Department was authorized to buy nails, lumber, cement, tractors, etc., which were not to be used by the Navy but by WHMS (in this instance) to construct, as independent contractors, the Ammunition Dump.

Delegation of Agency. Appellant takes the position that even if the Navy Department had the authority to make the purchase of the tractors here, it does not have the power under the Act to delegate this power to WHMS in this instance, and we agree with this view.

216 Section 156 reads as follows:

> § 156. *Determinations and decisions—(a) Powers of agency head; finality; delegation*
>
> The determinations and decisions provided in this chapter to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.
>
> *Non-delegable powers; delegation to chief procurement officer only*
>
> (b) The power of the agency head to make the determination or decisions specified in paragraphs (12)-(16) of section 151 (c) of this title and in section 154(a) of this title shall not be delegable, and the power to make the determination or decisions specified in paragraph (11) of Section 151(c) of this title shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000.

From the above we conclude that if the power in this instance was delegable at all, it would be only to an officer or official of the Navy. Here the attempt was to delegate the power to WHMS. It appears probable to us that the purchases here were to be made under paragraphs (12)-(16) of section 151(c), in which case there was no power to delegate, rather than under paragraph (10) as contended by appellees. Paragraph (10) designates "supplies and services for which it is impracticable to secure competition."

Appellees also contend that section 153(b) provides the authority for the execution of the contract under consideration. We think they would be right if the purpose of the contract with WHMS had been to buy and accumulate (for the future use of Navy Depart-

ment) materials, as contended by appellees, is repugnant to the over-all content and purpose of the contract. Not only are the contractors designated and treated as such in the contract but obviously the only purpose of the contract was to obtain the experience, skill and knowledge necessary to assemble proper materials and services and fashion them into an ammunition depot in the most efficient manner. If the United States had only been interested in
217 obtaining the services of a purchasing agent to buy materials it could, no doubt, have selected a competent Naval Officer at no extra cost to perform that function and, in all events, it could have surely secured the services of such an agent for considerable less than half a million dollars.

Reversed.

Holt and Robinson, JJ., dissent.

George Rose Smith, J., not participating.

ROBINSON, *Justice* (dissenting):

No one will contend that if the Government is a *bona fide* purchaser of equipment, a state sales tax should be collected. If the Government is not the purchaser in this instance, it is hard to imagine a situation where it is ever the purchaser. The Government is invisible and intangible and must, necessarily, act through agents and has the exclusive right to appoint its own agent, or agents. Certainly no state has the power to say who can, or who cannot, act as agent for the Government. Moreover, the Government, through its duly appointed agents, has the right, in fact it is the duty of such agents, to avoid incurring unnecessary expenses, including taxes.

The majority opinion is based principally on *Alabama* v. *King & Boozer*, 341 U.S.1, 62 S. Ct. 43, 46, 86 L. Ed. 3. An attempt is made to show that there is no real distinction between that case and the case at bar, but, in my opinion, the facts in the two cases are altogether different. None of the facts on which the court based the opinion in the *King & Boozer* case are present in this case.

In the *King & Boozer* case the court said: "As the sale of the lumber by King and Boozer was not for cash the precise question is whether the Government became obligated to pay for the lumber and so was the purchaser whom the statute taxes". Then the court pointed out the following facts upon which it based the opinion that the Government was not the purchaser:

(1) The contractor was required to make all such contracts in his own name, and on his own credit, and not bind or purport to bind the Government or the contracting officer.

(2) The Government was not to be bound by the purchase contract.

(3) The purchase order stated that the purchase did not bind or purport to bind the United States Government or Government officers.

218 (4) The Government's credit was not pledged and the court said: "We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price".

The facts in the present case which distinguish it from those set forth above are as follows:

(1) The Government was bound to pay for the equipment.
(2) The equipment was not bought in the name of the contractor or on the the contractor's credit.
(3) The Government's credit was pledged.
(4) The request for bids provides that the contractor shall not acquire title to any of the property purchased.

If the contractor had attempted to divert to his own use property purchased for this Government job, there is no court in the land that would not have enjoined such diversion, upon a showing of the facts in the case. This is true because the contractor had acquired possession of the property as agent of the Government. At no time did the contractor own the property, nor was the contractor liable for the payment of the purchase price, and the property had not been sold on the credit of the contractor. To say here that the Government must pay the sales tax is to say that it can never, at any time, employ a contractor to do any work without paying a sales tax to the state on all material the Government buys and pays for and the contractor uses in doing such work.

For the reasons set out herein, I respectfully dissent.

Holt, J., concurs in this dissent.

[File endorsement omitted.]

219 IN THE SUPREME COURT OF ARKANSAS, NOVEMBER TERM, 1952

9924

CARL F. PARKER, COMMISSIONER OF REVENUES, APPELLANT

v.

KERN-LIMERICK, INC., APPELLEES

JUDGMENT—January 12, 1953

This cause came on to be heard upon the transcript of the record of the chancery court of Pulaski County, Second Division, and was

argued by solicitors, on consideration whereof it is the opinion of the court that there is error in the proceedings and decree of said chancery court in this cause, in this: The court erred in holding that the sale in question was to the United States and that no tax was due the State of Arkansas.

It is therefore ordered and decreed by the Court that the decree of said chancery court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs, and that this cause be remanded to said chancery court for further proceedings to be therein had according to the principles of equity and not inconsistent with the opinion herein delivered.

It is further ordered and decreed that said appellant recover of said appellee all his costs in this court in this cause expended, and have execution thereof. Justices Holt and Robinson dissent: Justice George Rose Smith not participating.

220 IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION OF KERN-LIMERICK, INC. AND THE UNITED STATES OF AMERICA FOR REHEARING

Appellees, Kern-Limerick, Inc., and the United States of America, pray that they be granted a rehearing in the above styled case, and for grounds say:

1. The Court erred in its conclusion that the United States of America wrote into its contract with the contractor, WHMS, provisions for strict control of all purchases of labor, materials and equipment merely to obtain saving in money and time under a cost-plus contract.

2. The Court erred in its conclusion that before reimbursement is made by the United States of America to the contractor, WHMS, there must be funds appropriated by Congress no earlier than such reimbursement is due to be made.

3. The Court erred in its holding that under the provisions of Arkansas Statutes, 84-1902(c), (i), and 84-1903(e), and under the provisions of the contract between the United States of America and the contractor, WHMS, that WHMS was the purchaser from Kern-Limerick, Inc.

The Court erred in distinguishing the case of *Alabama* v. *King & Boozer*, 314 U.S. 1, from the present case on the three particular grounds cited by the Court.

5. The Court erred in its holding that the provision of the contract between the contractor, WHMS, and Kern-Limerick, Inc., that the United States of America only was obligated to pay the pur-

chase price makes no real difference in the liability of the contractor, WHMS, to pay the purchase price.

221 6. The Court erred in its holding that the equipment was paid for by the contractor, WHMS, before the equipment was delivered to the site of construction and inspected by the agent of the United States of America.

7. The Court erred in its holding that there was no sale to the United States of America because the United States of America was not obligated to pay until after the contractor, WHMS, had paid the purchase price.

8. The Court erred in its holding that the provision in the contract between the contractor, WHMS, and Kern-Limerick, Inc., to obligate only the United States of America to make payment of the purchase price is ineffective because of the purpose to avoid the State sales tax.

9. The Court erred in its holding that the provision of the contract between the contractor, WHMS, and Kern-Limerick, Inc., that title should vest in the United States of America, and never at any time in WHMS, does not distinguish this case from the case of *Alabama* v. *King & Boozer*, 314 U.S. 1.

10. The Court erred in its holding that the contractor, WHMS, had title at any time.

11. The Court erred in its holding that under the Armed Services Procurement Act of 1947, the United States of America was without authority to delegate the power to purchase the equipment in the manner in which the equipment was purchased in this case.

12. The Court erred in its holding that the contract between the United States of America and the contractor, WHMS, was under Section 151(c)(11-16), Title 41, USCA, rather than under Section 151(c)(10).

13. The Court erred in its holding that Section 153(b), Title 41, USCA, is not applicable.

14. The Court erred in its holding that under the Arkansas Gross Receipts Act of 1941 a tax on the transaction involved in this case is imposed on the United States of America.

222 WHEREFORE, appellees, Kern-Limerick, Inc., and the United States of America, pray that they be granted a rehearing herein, and that upon rehearing the decree of the Court appealed from be affirmed.

ROSE, MEEK, HOUSE, BARRON & NASH,
By WILLIAM NASH,
Solicitors for Kern-Limerick, Inc., Appellee.
BERRYMAN GREEN,
Solicitor for United States of America, Intervenor.

William Nash certifies that he prepared and has read the foregoing petition for rehearing, that he believes that there is merit in

the petition, and that it is not filed for the purpose of delay. He further certifies that a copy of said petition was on the 29th day of January, 1953, delivered in person to O. T. Ward, Solicitor for appellant.

Signed: WILLIAM NASH.

223 IN THE SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—February 23, 1953

The petition for rehearing in this cause is denied. Justice George Rose Smith not participating; Justices Holt and Robinson think the petition for rehearing should be granted.

224 IN SUPREME COURT OF ARKANSAS

[Title omitted]

PETITION OF KERN-LIMERICK, INC., AND UNITED STATES OF AMERICA FOR APPEAL—Filed May 21, 1953

Considering themselves aggrieved by the final decree and judgment of this Court entered on January 12, 1953, and order denying petition for rehearing entered February 23, 1953, Kern-Limerick, Inc., complainant-appellee, and the United States of America, Intervenor, do hereby pray that an appeal be allowed to the Supreme Court of the United States from said final decree and judgment and order denying the petition for rehearing and from each and every part thereof; that citation be issued in accordance with law; that an order be entered with respect to the appeal bond to be given by said complainant-appellee; that a supersedeas be granted pending the final disposition of this appeal, and that the amount of security, if any, be fixed by the order allowing the appeal; and that the material parts of the record, proceedings, and papers upon which said final judgment and decree and order denying petition for rehearing were based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such cases made and provided.

225 It is further prayed that the mandate to the Pulaski County Chancery Court, Second Division, issued in this case on March 4, 1953, be recalled.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General,
Counsel for the United States.
A. F. HOUSE,
WILLIAM NASH,
Counsel for Kern-Limerick, Inc.

[File endorsement omitted.]

226 IN SUPREME COURT OF ARKANSAS

[Title omitted]

ORDER ALLOWING APPEAL—Filed May 21, 1953

Kern-Limerick, Inc., complainant-appellee, and United States of America, Intervenor, having made and filed their joint petition praying for an appeal to the Supreme Court of the United States from the final decree and judgment of this Court in this cause entered on January 12, 1953, and order denying petition for rehearing entered February 23, 1953, and from each and every part thereof, and having presented their joint Assignment of Errors and prayer for reversal and their joint statement as to the jurisdiction of the Supreme Court of the United States on appeal, pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided.

Now, therefore, it is hereby ordered, that said appeal be and the same is hereby allowed as prayed for.

It is further ordered, that the amount of the appeal and supersedeas bond to be filed by the complainant-appellee be and the same is hereby fixed in the sum of $500.00, with good and sufficient surety, and shall be conditioned as may be required by law, and that the judgment be suspended and stayed until the termination of this appeal.

227 It is further ordered that the mandate heretofore issued on March 4, 1953, in this case and forwarded to the Pulaski County Chancery Court, Second Division, be and it is hereby recalled, and

It is further ordered that citation shall issue in accordance with law.

GRIFFIN SMITH,
Chief Justice of the Supreme Court of the State of Arkansas.

[File endorsement omitted.]

228 Supersedeas Bond on Appeal for $500.00 approved May 26, 1953, omitted in printing.

229 Citation in usual form showing service on Carl F. Parker, Commissioner, omitted in printing.

230 IN SUPREME COURT OF ARKANSAS

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed May 21, 1953

Kern-Limerick, Inc., complainant-appellee, and the United States of America, Intervenor, in the above-entitled cause, in connection with their appeal to the Supreme Court of the United States hereby file the following assignment of errors upon which they will rely in their prosecution of said appeal from the final judgment and decree of the Supreme Court of Arkansas entered January 12, 1953, and order denying petition for rehearing entered February 23, 1953.

The Supreme Court of the State of Arkansas erred:

1. In holding that under the pertinent contract between the United States, Winston Bros. Company, C. F. Haglin and Sons Company, Missouri Valley Contractors, Inc., and Sollitt Construction Company, Inc. (the contractor for the construction of the Naval Ammunition Depot at Shumaker, Arkansas), and the purchase orders issued thereunder to the complainant-appellee, the complainant-appellee made sales to that contractor rather than to the United States.

231 2. In holding that the sales made by the complainant-appellee are validly taxable under the Arkansas Gross Receipts Tax Act of 1941, Act No. 386 of the Acts of Arkansas for 1941 (Arkansas Statutes, 1947, sections 84-1901 to 84-1919).

3. In holding that the sales made by the complainant-appellee were not sales to the United States and are not immune from taxation by the State of Arkansas under the Constitution of the United States.

4. In holding that the United States (through the Navy Department) was without the authority or power to make the purchases in question from the complainant-appellee in the form in which those purchases were made, and in holding that the contract between the United States and the contractor for the construction of the Naval Ammunition Depot at Shumaker, Arkansas, was a delegation of power prohibited by the Armed Services Procurement Act of 1947.

5. In reviewing and overruling the determinations of the proper officials of the Navy Department that the contract with the contractor and the purchase agreements with complainant-appellee were proper under the Armed Services Procurement Act.

6. In holding that the Arkansas Gross Receipts Tax Act of 1941, as applied to the sales involved here, is not repugnant to, and violative of, the Constitution of the United States.

WHEREFORE, complainant-appellee, Kern-Limerick, Inc., and the United States of America, Intervenor, pray that the final judgment

and decree of the Supreme Court of the State of Arkansas be reversed, and for such other relief as the Court may deem fit and proper.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General,
Counsel for the United States.
A. F. HOUSE,
WILLIAM NASH,
Counsel for Kern-Limerick, Inc.

[File endorsement omitted.]

232-233 Statement required by Paragraph 2 of Rule 12 of the Rules of the Supreme Court of the United States (omitted in printing)

234-235 Praecipe (omitted in printing)

236 Clerk's Certificate to foregoing transcript omitted in printing.

237-238 IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

[Title omitted]

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed June 18, 1953

a. Appellants adopt for their statement of points upon which they intend to rely on their appeal to this Court the points contained in their Assignment of Errors heretofore filed.

b. Appellants designate the entire record herein for printing by the Clerk of this Court, except that the following may be omitted:

Exhibits A, and C-N (inclusive) to the stipulation (Transcript of Record, pp. 91, 96-225, Incl.).

ROBERT L. STERN,
Acting Solicitor General,
Counsel for the United States,
Appellant.

A. F. HOUSE,
WILLIAM NASH,
Counsel for Kern-Limerick, Inc.,
Appellant.

Proof of Service (omitted in printing).

239 [File endorsement omitted.]

240 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 115

[Title omitted]

ORDER NOTING PROBABLE JURISDICTION—October 12, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

The Chief Justice took no part in the consideration or decision of this question.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1953 279847 960

IN THE SUPREME COURT OF ARKANSAS

No. 9924

CARL F. PARKER, COMMISSIONER OF REVENUE FOR THE STATE OF ARKANSAS, APPELLANT,

v.

KERN-LIMERICK, INC., AND UNITED STATES OF AMERICA, APPELEE AND INTERVENOR

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, Kern-Limerick, Inc., and the United States of America, appellants (in the Supreme Court of the United States), submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of the State of Arkansas entered in this cause.

OPINIONS BELOW

The decree of the Pulaski County Chancery Court is not reported. The opinion of the Supreme Court of the State of Arkansas reversing that decree is reported at 254 S. W. (2d) 454. Copies of the Chancery Court decree and the opin-

ions of the Supreme Court are attached hereto in Appendix B and C respectively.

JURISDICTION

1. The judgment of the Supreme Court of the State of Arkansas was entered on January 12, 1953. A petition for rehearing was seasonably filed by appellants Kern-Limerick, Inc., and the United States on January 29, 1953, was entertained, and was denied on February 23, 1953. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1257(2) and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Standard Oil Co.* v. *Johnson,* 316 U.S. 481; *United States* v. *Allegheny County,* 322 U.S. 174, 191; *United States* v. *Burnison,* 339 U.S. 87; *Penn Dairies* v. *Milk Control Comm'n.,* 318 U.S. 261; *Pacific Coast Dairy* v. *Department,* 318 U.S. 285; *Esso Standard Oil* v. *Evans,* Nos. 330 and 378, decided by the Supreme Court on May 4, 1953; *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U.S. 282.

2. In its petition filed in the Chancery Court of Pulaski County, Arkansas, appellant Kern-Limerick, Inc., alleged that the imposition of the Arkansas Gross Receipts tax under the facts of this case "is invalid on the ground that it is repugnant to the Constitution of the United States * * *" (Tr. 2) and "that by imposing a gross receipts tax upon such transaction the defendant has construed

and applied the Arkansas Gross Receipts Act of 1941 in a manner which renders that statute invalid under the Constitution of the United States of America" (Tr. 2). In intervening, the United States adopted these allegations. (Tr. 17-18.) The Chancery Court of Pulaski County, Arkansas, ruled favorably upon these contentions, saying (Tr. 22; Appendix B):

> The Court doth further find that the said sale by the plaintiff is a sale to the United States Government and is exempt from taxation under the provisions of The Gross Receipts Act of 1941; that the imposition of the gross receipts tax upon said sale is repugnant to the Constitution of the United States of America in that it violates the immunity of the United States of America from taxation by states or political subdivisions thereof; and that by imposing a gross receipts tax upon the said transaction the defendant has construed and applied The Arkansas Gross Receipts Act of 1941 in a manner which renders that statute invalid under the Constitution of the United States of America.

On appeal to the Supreme Court of Arkansas, appellants Kern-Limerick, Inc., and the United States urged as Point III of their brief (pp. 26-28) that "The construction placed on the Arkansas Gross Receipts Tax Act of 1941 by the State of Arkansas to impose a tax on the transaction here involved render that statute invalid under the Constitution of the United States of America", and in

Point IV of their brief (pp. 28-30) urged that "The imposition of the Arkansas Sales Tax on the transaction here involved violates the immunity of United States of America from taxation by the states or their political subdivisions." It was contended in these arguments that the sale involved here was made to the United States and the taxing act would be unconstitutional if applied.[1] The Supreme Court of Arkansas, holding that the sale in question was not made to the United States but to its contractor, considered *Alabama* v. *King & Boozer,* 314 U. S. 1, as controlling, and held the Arkansas Gross Receipts taxing act valid as applied here. See Appendix C.

3. The validity of the Arkansas statute was drawn in question and sustained and the Supreme Court of the United States therefore has jurisdiction of this appeal under 28 U.S.C. 1257 (2), even though the Arkansas statute expressly exempts gross receipts "derived from sales to the United States Government" (Arkansas Statutes, 1947, Sec. 84-1904(g), Appendix A), and the State Supreme Court purported to bring the case within the terms of the Act by holding that the sale here was not to the United States. In so holding, the State Supreme Court was applying federal law and

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[1] The present appellants also contended, on the appeal to the Supreme Court of Arkansas, that under the applicable federal law, the Navy could validly enter into the construction contract involved in this case. See Supplemental Abstract and Brief for Appellee in the Supreme Court of Arkansas, pp. 12-14, 30-36, and Brief of Appellee and Intervenor on Petition for Rehearing, pp. 10-12.

was upholding the validity of the Arkansas statute as it pertained to the present facts. This precise point was considered and decided in *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 482-3, in which a California motor vehicle fuel license tax statute likewise exempted sales to the United States; the Supreme Court of the United States upheld its jurisdiction on appeal.

4. The Supreme Court of the United States has jurisdiction to consider those issues presented herein which may not be appealable under 28 U.S.C. 1257(2) but are reviewable by certiorari under 28 U.S.C. 1257(3), since all such issues are included in the Assignment of Errors filed herewith. See *Flournoy* v. *Wiener,* 321 U. S. 253, 263; *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 547; *Wilson* v. *Cook,* 327 U.S. 474, 482. See also 28 U.S.C. 2103.

QUESTIONS PRESENTED

1. Whether the Arkansas Gross Receipts tax statute can constitutionally be applicable to a sale by a vendor of equipment used in the performance of a cost-plus-fixed-fee contract with the United States, where the purchase was in the name of the United States and not of the contractor, title to the equipment passed directly from the vendor to the United States, and the United States alone was obligated to the vendor for payment of the purchase price.

2. Whether the purchasing arrangement established in the cost-plus contract involved here was

authorized by the Armed Services Procurement Act of 1947.[1a]

STATUTES INVOLVED

The pertinent provisions of the Arkansas Gross Receipts tax statute (Act No. 386 of Acts of Arkansas of 1941) and of the Armed Services Procurement Act of 1947 are set forth in Appendix A.

STATEMENT

1. Through the Department of the Navy, the United States negotiated and entered into a cost-plus-fixed-fee contract with a joint venture composed of Winston Bros. Company, C. F. Haglin and Sons Co., Missouri Valley Constructors, Inc., and Sollitt Construction Company, Inc. (hereinafter called the contractor or WHMS) for the construction and completion of the Naval Ammunition Depot at Shumaker, Arkansas. This contract was entered into under Sections 2 (c)(10) and 4(b) of the Armed Services Procurement Act of 1947 (Appendix A).

In the course of the construction, certain heavy equipment was purchased from appellant Kern-Limerick, Inc., of Little Rock, Arkansas. The method of authorizing, conducting, and consummating such a purchase, and the instruments required by the United States to be used in connection therewith, are not in dispute.

When the contractor desired such equipment, it made a "Purchase Request" therefor to a desig-

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[1a] All the points raised in the Assignment of Errors are also presented. The Questions Presented stated above set forth the major issues.

nated officer of the United States. The United States reviewed and approved the request or, in the event of disapproval, the equipment would not be purchased. After approval by the officer of the United States, the contractor prepared and mailed to possible vendors a "Request for Bid,"[2] which recited "Please quote herein, subject to conditions on reverse side, your lowest price for the following material to be delivered * * *." One of the conditions was as follows:

> 3. This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price, but the Contractor shall handle all payments hereunder on behalf of the Government. The Vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof.

A number of bids were submitted, which were opened by and read in the presence of representatives of the contractor and two representatives of the United States, and the bid of appellant Kern-Limerick, Inc., was recommended as the lowest acceptable bid. The purchase contract was prepared accordingly, and when it had been approved by an

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[2] This "Request for Bid" was in the name of the Bureau of Yards and Docks, Navy Department, "by" the contractor as "purchasing agent".

official of the United States, it was forwarded to Kern-Limerick, Inc., on a "Purchase Order" which provided as a condition of the purchase the same condition number 3 quoted above. At that time, federal funds were available and had to be available for the payment of the purchase price. If federal funds had not been available, the purchase order would not have been forwarded to Kern-Limerick, Inc.

Kern-Limerick, Inc., shipped the equipment to the officer in charge of construction (a United States Naval Officer, acting for the Contracting Officer, who was the Chief of the Bureau of Yards and Docks, Navy Department) in care of the contractor, at Shumaker, Arkansas, where it was received, inspected, and approved by a representative of the United States and a representative of the contractor, both being required to be present.

Kern-Limerick, Inc., submitted its invoice to the contractor under the provisions of condition number 3 quoted above. The contractor paid it and was reimbursed by the United States.

Under the terms of the purchase, as set forth above, title passed from Kern-Limerick, Inc., directly to the United States, without passing through the contractor, and for the payment of the purchase price the credit of the United States only was pledged. Possession of the equipment was delivered to the United States, through its own officers. All this was in accord with the contract of WMHS with the United States which expressly provided (Article 8) (a) that in purchasing sup-

plies and equipment the contractor was to be "the purchasing agent of the Government * * * and the Government shall be directly liable to the vendors for the purchase price," (b) that title to all supplies was to pass directly from the vendor to the Government, and (c) that all purchases over $500 had to have the written approval of the Officer-in-Charge.

2. Act No. 386 of the Acts of Arkansas of 1941 (Arkansas Statutes, 1947, Sec. 84-1902 *et seq.*) imposes a 2% gross receipts tax on sales within the state. See Appendix A. Taxable sales are defined as transfers "of either title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished," and are expressly declared to include sales of supplies and equipment to contractors "who use same in the performance of any contract." However, there is specifically exempted from taxation the "gross receipts or gross proceeds derived from sales to the United States Government." Where a tax is payable, the vendor is required to collect the tax from the purchaser.

The Arkansas Revenue Commissioner demanded payment of the tax from appellant Kern-Limerick, Inc., in the amount of $342.93. The United States refused to pay the tax, so that Kern-Limerick, Inc., filed a gross receipts tax return covering the transaction, paid the amount of the tax under protest, demanded a refund of the tax and a hearing to determine whether the sale was taxable. After

a hearing, the State Commissioner of Revenues found the sale taxable and Kern-Limerick, Inc., brought suit for refund in the Chancery Court, Second Division, Pulaski County, Arkansas, as provided by State law. The United States intervened in the suit. On a trial of the issues, the Chancery Court entered its decree that the sale was not taxable and ordered a refund (Appendix B). The Commissioner of Revenues appealed to the State Supreme Court.

The Arkansas Supreme Court, two members dissenting and one member not participating, held that the sale was to the contractor, not to the United States, and was taxable, and also apparently held that the United States was without authority to employ the contractor to act for it in purchasing equipment. The dissenting opinion expressed the view that if the sale in question was not to the United States, then it was impossible to conceive of a sale to the United States.

THE QUESTIONS ARE SUBSTANTIAL

1. For the construction of the Naval Ammunition Depot at Shumaker, Arkansas, the procedure for making purchases and all the incidental forms, including the order of purchase which constituted the purchase contract itself, required that the sales be to the United States and pledge the credit of the United States only. In these vital respects the transaction with the vendor, Kern-Limerick, Inc., differs markedly from that before the Supreme Court in the controlling case of *Alabama* v. *King*

& Boozer, 314 U.S. 1, a decision which turned wholly on the circumstance that the significant factors in the purchase transaction were directly opposite to those present here.

In *King & Boozer,* the agreement between the cost-plus contractor and the United States provided that the contractor had to make all purchase contracts in its own name, and could not bind or purport to bind the Government (314 U.S., at 11). In this case, the contract of purchase had to be made in the name of the United States and was not to bind or purport to bind the contractor. In *King & Boozer,* the sale was in terms to the contractor and not to the Government (314 U.S. at 12 fn. 2); here, the sale was in terms made to the United States and not to the contractor. In *King & Boozer,* the contractor was required to pledge his own credit and was prohibited from pledging the credit of the United States (314 U.S. at 11, 11-12, 13). In the present case, only the credit of the United States is pledged and the vendor so understands. In *King & Boozer,* the Court expressly found that the United States was not obligated to pay the purchase price (314 U.S. at 13). In the present case, it is difficult to comprehend how the United States could escape being liable to pay the purchase price.

There are other material differences in the facts of the two cases. In *King & Boozer,* title to the purchased materials could vest for an appreciable period in the cost-plus contractor (314 U.S. at 10, 13-14), while in this case it was expressly con-

templated that the contractor was never to have title. The arrangments for purchases in *King & Boozer* required the contractor to insert in its purchase agreements a provision that the agreement was assignable to the Government (314 U.S. at 11); here, the purchase agreement was initially made with the Government and there could be no occasion for assignment. Unlike the earlier case, in the present case funds appropriated by Congress had to be available before the purchase was completed; bids in response to a Request for Bid had to be approved by a Navy representative as well as the contractor's employee; and the actual purchase order had to be approved by a naval officer.

The *King & Boozer* decision indisputably pivots on these very factors in which the present case differs. The Court declared that the "precise question" was "whether the Government became obligated to pay for the lumber" (314 U.S. at 10) and concluded that "the legal effect of the transaction which we have detailed was to obligate the contractors to pay for the lumber" (314 U.S., at 12). The thread binding the entire opinion and by which taxability was marked, was that the contractor and not the Government was bound for the purchase price (314 U.S. at 10, 12, 13, 14). The contractor and not the Government was the purchaser, and therefore the state tax was not levied on a federal transaction. The situation is reversed in this case; the Government and not the contractor is the purchaser and the impost is therefore squarely on the Government. In these circum-

stances the rationale of the *King & Boozer* decision points directly to a result opposite to that reached there. Construed as it has been by the Arkansas Supreme Court to cover these sales, the state statute is invalid. See also *Mayo* v. *United States,* 319 U.S. 441, 447; *United States* v. *Allegheny County,* 322 U.S. 174, 176-177, 186, 189, 192; *S.R.A., Inc.* v. *Minnesota,* 327 U.S. 558, 561-2; *Esso Standard Oil Co.* v. *Evans,* Nos. 330 and 378, this Term, decided May 4, 1953, slip op., p. 5.

2. The Supreme Court of Arkansas also erred in holding that the cost-plus contract between the United States and WHMS could not validly make WHMS the Navy's purchasing agent to the extent that it was. Article 40 of the contract specifies that it is made under the authority of Section 2(c)(10) and 4(b) of the Armed Services Procurement Act of 1947 (Appendix A, *infra*), "and any required determination and findings with respect thereto have been made". Under those sections of the Procurement Act, the personal approval of the Secretary of the Navy is not required, and the approval which was given by a representative of the Bureau of Yards and Docks suffices. See Section 7, Appendix A, *infra*.[3] Moreover, the particular purchase from Kern-Limerick, Inc., was authorized by a naval officer, as were the terms of the purchase order itself. All the requirements of the Procurement Act were therefore fulfilled and

[3] The Secretary of the Navy orally approved the Ammunition Depot project and the selection of WHMS as contractor.

the State Supreme Court clearly erred in attempting to decide for itself whether the administrative determinations required by the statute for negotiated agreements had been correctly made.

3. The questions involved are substantial and important, for the United States has been and is engaged in a large amount of construction work based on similar cost-plus-a-fixed-fee contracts, with similar tax statutes applicable, and it is important to the United States, as well as to the states and vendors to the Government, that these questions be settled. The Bureau of Yards and Docks of the Navy Department has used similar purchasing arrangements since 1943, and until this case state revenue authorities have not sought to tax such purchases.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General,
Counsel for the United States.

A. F. HOUSE,
WILLIAM NASH,
Counsel for Kern-Limerick, Inc.

MAY, 1953.

APPENDIX A

Arkansas Statutes, 1947:

SEC. 84-1902.—*Definitions.*—* * *

* * * * *

(c) Sale: The term "sale" is hereby declared to mean the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished. * * *

* * * * *

(i) Consumer-User. The term "consumer" or "user" means the person to whom the taxable sale is made, or to whom saxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this act * * *.

* * * * *

SEC. 84-1903. *Two per cent tax levied.*—There is hereby levied an excise tax of two [2%] per centum upon the gross proceeds or gross receipts derived from all sales to any person subsequent to the effective date of this act * * *, of the following:

(a) Tangible Personal Property.

* * * * *

(e) * * *

Sales of service and tangible personal property including materials, supplies and equipment made to contractors who use same in the performance of any contract are hereby declared to be sales to consumers or users and not sales for resale. * * *

SEC. 84-1904. *Exemptions from tax.*—There is hereby specifically exempted from the tax imposed by this act the following:

* * * * *

(g) Gross receipts or gross proceeds derived from sales to the United States Government.

* * * * *

SEC. 84-1908. *Collection of tax by persons furnishing taxable service—Tokens-Redemption of—Priority of tax claim.*—* * *

* * * * *

The seller, or person furnishing such taxable service, shall collect the tax levied hereby from the purchaser.

* * * * *

Armed Services Procurement Act of 1947 (Act of February 19, 1948, ch. 65, 62 Stat. 21):

Sec. 2. * * *

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such pur-

chases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of national emergency declared by the President or by Congress;

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $1,000;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical supplies;

(8) for supplies purchased for authorized resale;

(9) for perishable subsistence supplies;

(10) for supplies or services for which it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test: *Provided,* That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been en-

tered into pursuant to this subsection (11) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder;

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for supplies of a technical or specialized nature requiring a substantial initial investment or an extended period of preparation for manufacture, as determined by the agency head, when he determines that advertising and competitive bidding may require duplication of investment or preparation already made, or will unduly delay procurement of such supplies;

(15) for supplies or services as to which the agency head determines that the bid prices after advertising therefor are not reasonable or have not been independently arrived at in open competition: *Provided,* That

no negotiated purchase or contract may be entered into under this paragraph after the rejection of all bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder, (B) the negotiated price is lower than the lowest rejected bid price of a responsible bidder, as determined by the agency head, and (C) such negotiated price is the lowest negotiated price offered by any responsible supplier;

(16) the agency head determines that it is in the interest of the national defense that any plant, mine, or facility or any producer, manufacturer, or other supplier be made or kept available for furnishing supplies or services in the event of a national emergency, or that the interest either of industrial mobilization in case of such an emergency, or of the national defense in maintaining active engineering, research and development, are otherwise subserved: *Provided,* That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (16) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder; or

(17) otherwise authorized by law.

* * * * *

Sec. 4. * * *

(m) The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). Neither a cost nor a cost-plus-a-fixed-fee contract nor any incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure supplies or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee contract or an incentive-type contract. All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a

cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either $25,000 or 5 per centum of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

* * * * *

Sec. 7. (a) The determinations and decisions provided in this Act to be made by the Agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

(b) The power of the agency head to make the determinations or decisions specified in paragraphs (12), (13), (14), (15), and (16) of section 2 (c) and in section 5 (a) shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 2 (c) shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not

require the expenditure of more than $25,000.

(c) Each determination or decision required by paragraphs (11), (12), (13), (14), (15), or (16) of section 2 (c), by section 4 or by section 5 (a) shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination. A copy of the findings shall be submitted to the General Accounting Office with the contract.

(d) In any case where any purchase or contract is negotiated pursuant to the provisions of section 2 (c) except in a case covered by paragraphs (2), (3), (4), (5) or (6) thereof, the data with respect to the negotiation shall be preserved in the files of the agency for a period of six years following final payment on such contract.

APPENDIX B

CHANCERY COURT OF PULASKI COUNTY

(Caption omitted.)

DECREE

On this day appeared the plaintiff, Kern-Limerick, Inc., by its Solicitors, Rose, Meek, House, Barron & Nash, the defendant, Carl F. Parker, Commissioner of Revenues for the State of Arkansas, by its Solicitor, O. T. Ward, and the Intervenor, United States of America, by its Solicitor, Berryman Green, and upon a showing that

Dean R. Morley is no longer the Commissioner of Revenues for the State of Arkansas and oral motion of O. T. Ward, the cause of action is hereby revived in the name of and against Carl F. Parker, presently the Commissioner of Revenues for the State of Arkansas and successor to Dean R. Morley; and all parties hereto announcing ready for trial, this cause is submitted to the Court upon the petition of Kern-Limerick, Inc. with its exhibits, the response of the defendant thereto, the intervening petition of the United States of America, the answer of the defendant thereto, stipulation of counsel with its exhibits filed herein, and argument of counsel; and the Court being well and sufficiently advised as to all matters of fact and law arising herein, doth find that on December 14, 1950, the plaintiff sold and delivered to the United States of America, f.o.b. Shumaker, Arkansas, two (2) Allis-Chalmers HD-50 Diesel tractors for $8,573.33 each, or for a total price of $17,146.66; that the sale was made upon the purchase order of the Navy Department, Bureau of Yards and Docks, by Winston Bros. Company, C. F. Haglin and Sons Co., The Missouri Valley Constructors, Inc., and Sollitt Construction Company, Inc., as the purchasing agent for the United States of America, and under their contract with the United States of America, designated as NOy 23197; that the United States of America and Winston Bros. Company, C. F. Haglin and Sons Co., The Missouri Valley Constructors, Inc., and Sollitt Construction Company, Inc., refused to pay on the said transaction any tax as a gross receipts tax due under The Arkansas Gross Receipts Act of 1941; that on the 11th day of September, 1951, plaintiff filed with the

defendant a gross receipts tax return covering the said transaction and tendered under protest the sum of $342.93 demanded and claimed by the defendant to be due as a gross receipts tax on the said transaction; that with the said tender plaintiff made demand in writing for a refund of the said payment and requested the defendant to grant a hearing to determine whether the said transaction is taxable under the provisions of The Arkansas Gross Receipts Act of 1941; that the defendant granted plaintiff's request and held said hearing on the 24th day of September, 1951; that upon said hearing the defendant issued an order finding that the said transaction is taxable and the tax due under the provisions of the said The Arkansas Gross Receipts Act of 1941, but further finding that no penalty should be assessed on account of said tax; that the plaintiff within proper time filed its petition for a refund; and that the United States of America properly intervened herein and is a proper party to this action.

The Court doth further find that the said sale by the plaintiff is a sale to the United States Government and is exempt from taxation under the provisions of The Gross Receipts Act of 1941; that the imposition of the gross receipts tax upon said sale is repugnant to the Constitution of the United States of America in that it violates the immunity of the United States of America from taxation by states or political subdivisions thereof; and that by imposing a gross receipts tax upon the said transaction the defendant has construed and applied The Arkansas Gross Receipts Act of 1941 in a manner which renders that statute invalid under the Constitution of the United States of America.

It is, therefore, by the Court considered, ordered, adjudged and decreed that the plaintiff recover from the defendant the sum of $342.93, together with its costs herein expended.

The defendant objects to the findings of the Court, and its order granting relief to the plaintiff, and prays an appeal, which appeal is hereby granted.

This order having been granted on the 23rd day of April, 1952, but omitted from record, is ordered to be entered now for then.

APPENDIX C

SUPREME COURT OF ARKANSAS

(Caption omitted.)

OPINION

The United States of America, through and on behalf of the Navy Department, entered into a written contract (designated as NOy23197) with Winston Bros. Company, C. F. Haglin and Sons Company, Missouri Valley Contractors, Inc., and Sollitt Construction Company, Inc. (hereinafter referred to as WHMS) to construct a Naval Ammunition Depot at Shumaker, Arkansas, the total cost of which was approximated at $30,800,000.00. By the terms of the contract of employment WHMS was to procure all labor, supplies, materials, etc., necessary for constructing and equipping said depot and pay for the same, and the Government was to reimburse WHMS for all such expenditures and pay them, in addition, the sum of

$580,000.00 for their services as contractors. The type of contract referred to is designated and is generally known as a "Cost-Plus-a-Fixed-Fee Contract." Other provisions of the contract will be specifically mentioned later.

The question herein to be decided arose in the manner presently set forth. On December 14, 1950 Kern-Limerick, Inc., a machinery and equipment company of Little Rock, Arkansas, sold to WHMS (as contended by appellant) or to the United States (as contended by the latter) two diesel tractors for a total price of $17,146.66, and the tractors were delivered at the site of construction at Shumaker, Arkansas. The Revenue Commissioner for the State of Arkansas demanded payment from Kern-Limerick, Inc. in the sum of $342.93 as a 2% tax on the sale price pursuant to the provisions of the Arkansas Gross Receipts Act of 1941. Payment of the tax was made under protest by Kern-Limerick, Inc. and later suit was filed in the Chancery Court of Pulaski County, Arkansas for the recovery of the amount so paid. The United States intervened in this suit, contending that the sale in question was a sale to it and that consequently no tax was collectible thereon by the State of Arkansas. The Chancery Court held with the contention of the United States and the Commissioner of Revenues for the State of Arkansas has appealed to this Court for a reversal.

The 1941 Gross Receipts Act, refered to before, provides that no tax shall be paid on sales to the United States; therefore, the question confronting this Court is whether the sale in question was made to WHMS or to the United States. To answer this

question it is necessary to examine the provisions of the contract between WHMS and the United States and to do so in the light of court decisions relating thereto.

In order to obtain the savings in money and time that may reasonably be expected by the negotiation of a cost-plus contract such as the one here involved, it is obvious that the U. S. Government must maintain, and so the contract must provide, effective control over all purchases by the contractor; otherwise, the Government could not be assured it would receive standard materials and services at the lowest possible prices. Therefore, as would be expected, the United States in this case wrote into its contract with WHMS provisions for strict control of all purchases of labor, materials, and equipment which were to be used in or for the construction of the Ammunition Depot.

Contract. Some of the pertinent provisions were: (a) All applications for purchases, all bids, and all purchases must be made on Government (Navy) forms and all must be approved by an Officer in Charge who was an officer representing the Navy Department; (b) After approval WHMS consummated the transaction by paying the purchase price and taking delivery at the site of construction at Shumaker, Arkansas; (c) Upon presentation of the evidences of purchase and upon a showing that all requirements had been complied with, the purchase price paid, and delivery made, the Government would reimburse WHMS. Before reimbursement it must also appear that the Government had appropriated money for that purpose; (d) Title to the property so purchased never vested

in WHMS but did vest in the United States; (e) WHMS was acting as purchasing agent for the United States in negotiating all purchases; (f) The United States was obligated to the vendor to pay the purchase price; and (g) The vendor was to make demand for payment by submitting an invoice to WHMS.

Some of the terms of the contract, including those designated (e), (f) and (g) above, were printed on the back of all "Request for Bids" and "Purchase Order" blanks which went to prospective vendors.

Arkansas Statute. That tax sought to be imposed herein by the Arkansas Revenue Commissioner is levied by Act No. 386 of 1941, which specifies a tax of 2% (*Ark. Stats.* 84-1903) upon the gross proceeds derived from all sales, and requires the vendor (*Ark. Stats.* 84-1908) to pay the tax to the Comissioner. Some other pertinent provisions of said Act No. 386 are set out below.

(1) *Ark. Stats.* 84-1902 (c):

> Sale: The term 'sale' is hereby declared to mean the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished.

(2) *Ark. Stats.* 84-1902 (i):

> Consumer-User: The term 'consumer' or 'user' means the person to whom the taxable sale is made, or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal

property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this Act.

(3) *Ark. Stats.* 84-1903 (e)—last paragraph:

Sales of service and tangible personal property including materials, supplies and equipment made to contractors who use same in the performance of any contract are hereby declared to be sales to consumers or users and not sales for resale.

As has been previously stated, the vital question is: Who was the "purchaser" in this instance? Was is WHMS or the United States? It is conceded that if it was the former the tax is collectible, and if it was the latter the tax is not collectible. The opinion of the United States Supreme Court in the case of *Alabama* v. *King and Boozer* (which will be cited later), in which this same question was under consideration, contains this language: "Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority." Giving a reasonable interpretation to the language of the Arkansas Gross Receipts Act as it is set out in sub-paragraphs above (1) defining a Sale, (2) defining Consumer-User, and (3) relating to contractors, and having in mind all the provisions of the contract between WHMS and the United States, we are of the opinion that WHMS was the "purchaser" in this instance and that consequently

Kern-Limerick, Inc. is liable to the Commissioner for the tax on the two tractors which it sold.

Notwithstanding the above, however, it is obvious that the State of Arkansas could not arbitrarily define WHMS as the "purchaser" and thereby impose a tax on the United States Government if in fact and in truth the latter was the purchaser in this instance, and so we will proceed to consider the question from that standpoint after making this further observation. In determining whether or not the State of Arkansas has acted arbitrarily in enacting this particular Act with the language it contains depends on whether the Act is discriminatory, and, particularly in this instance, whether it discriminates against the United States. The opinion referred to above recognizes this test and makes it clear that the mere fact that the tax is eventually passed on to the Federal Government is no indication it is discriminatory or that it violates the immunity of the Government. In our opinion the Arkansas Statute meets all the tests.

Was the United States the Purchaser? In coming to the conclusion that the United States was not, in this instance, the "purchaser", we base our decision primarily on the opinion in the case of *Alabama* v. *King and Boozer,* 314 U. S. 1, decided in 1941. The question for decision in that case was the same as presented here and was based on facts, with the exceptions later noted, very similar to the facts of this case. The opinion which overruled some former decisions and approved others is comprehensive and logical and appears to be a landmark case on the issue involved. It upheld the imposition of a sales tax by an Alabama Statute on the sale of lumber by King and Boozer to a

cost-plus-a-fixed-fee contractor who was engaged in constructing a project for the Government pursuant to a contract presently to be mentioned.

For the sake of brevity it suffices for this opinion to say that the Government contract in the *King and Boozer* case was like the contract here with the same provisions and regulations except three on which the intervenor relies to distinguish the two cases. The three exceptions referred to are: (a) In the cited case the contractor was liable to the vendor for the purchase price while here the contract provides the Government shall be liable; (b) Here the contract designates the contractor (WHMS) as Purchasing Agent for the Government, while in the cited case no such provision appears in the contract; and (c) Here the contract provides that title to any purchased article vests immediately in the Government while in the cited case it vested in the Government upon delivery at the site of construction and approval by the Government.

It is our judgment that the distinguishing features set out above are more synthetic than real and that they do not justify a conclusion here different from that reached in the *King and Boozer* opinion.

(a) Appellees lay great stress on the fact that here the Government has obligated itself to pay the vendor and that this indicates the Government was the real purchaser, and say that this feature, which was lacking in the *King and Boozer* case, was a necessary element to sustain the opinion. The cited opinion does contain this phrase: "It is equally plain that they (the contractors) did not

assume to bind the Government to pay for the lumber . . ." We are not convinced that the court attached the same importance to this feature as appellees do, but we are convinced that there is actually no real difference. Under the terms of the contract here it is hard to see how the credit of the Government could be pledged to the vendor. In the process of buying the tractors the Government (through the Navy Officer in Charge) checked every step in detail. When the sale was finally made the tractors were paid for by WHMS, delivered to the site of construction, and again checked and inspected by the agent. Only then and after WHMS proved to the Government's satisfaction that the purchase price had been paid by WHMS to Kern-Limerick, Inc. did the Government reimburse WHMS. We are convinced that this provision pledging the credit of the Government was not placed in the contract because of any necessity to further protect the interest of the Government, but for another purpose, and may be considered redundant. We understand appelles do not seriously deny this provision was inserted to avoid the effect of the decision in the *King and Boozer* case. Granting the propriety of such purpose, we do not think it effective.

(b) *WHMS as Purchasing Agent.* Much of what was said above applies to this provision of the contract and especially as to the possible purpose of its insertion. Actually, the contractor in the *King and Boozer* case acted as effectively as an agent for the Government as WHMS does under the contract in this case. However, in neither case do we deem it proper to speak of the contractor as

an "agent" because in each instance he was a contractor (an independent contractor) and was so designated in the contract of employment. Whether WHMS could be legally made an agent for the purpose of making purchases for the Government in this instance will be later discussed.

(c) *Title in the Government.* The fact that under the terms of the contract title to the tractors never rested in WHMS also, as we view the entire case, fails to distinguish this case from the *King and Boozer* case. There the title to the lumber rested in the contractor only until the lumber was delivered and paid for and then title automatically vested in the Government. The practical result was the same in both instances and we are unwilling to say that the legal fiction of divesting WHMS of title momentarily here has any significant bearing on the immunity of the United States from taxation. By no process of reasoning can we see how such a provision was necessary to better protect the interest of the Government, and we again conclude it must have been devised for another purpose.

Before the decision in the *King and Boozer* case Congress had refused to exempt from taxation purchases made by cost-plus contractors in constructing projects for the Government. Since the decision an attempt to evade its effect was made by proposed legislation in the Congress, but, after exhaustive hearings, Congress refused to sanction such enactment. In view of this definite attitude on the part of the Government itself, we think any attempt to reach a different result by skillful legal phraseology should be cautiously considered. We

recognize the supremacy of the Government in the field of taxation and the urgency of the need for funds by both the State and Federal Governments, but where the interests of the two conflict, it is necessary to have a division line with due respect for both. The idea is well expressed, in the opinion referred to, in this language:

> So far as such a non-discriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties.

Armed Service Procurement Act of 1947. This Act of Congress will be referred to by sections as it appears in *USCA.,* Volume 41, page 189, Title 41, beginning with Section 151. In some way, appellees urge, this Act strengthens their contention that the United States was the actual purchaser in this instance. Their theory seems to be that the Act gives direct authority to the Navy Department to make purchases for its own use and purposes, that this authority can be delegated to an agent, and that such delegation was made in this instance to WHMS. We do not agree with this interpretation of the Act.

As we see it, the over-all purpose of this Procurement Act was to empower the Navy Department (as well as the Army, Air Force and Coast Guard) to purchase (or contract to purchase) supplies or services for its own *use,* as stated in Section 151. Considering, without holding, the Act authorized the Navy Department to buy an Ammunition

Dump at Shumaker, Arkansas (had one been in existence) for its use, it does not follow that the Navy Department was authorized to buy nails, lumber, cement, tractors, etc., which were not to be used by the Navy but by WHMS (in this instance) to construct, as independent contractors, the Ammunition Dump.

Delegation of Agency. Appellant takes the position that even if the Navy Department had the authority to make the purchase of the tractors here, it does not have the power under the Act to delegate this power to WHMS in this instance, and we agree with this view.

Section 156 reads as follows:

> § 156. *Determinations and decisions—(a) Powers of agency head; finality; delegation*
>
> The determinations and decisions provided in this chapter to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

Non-delegable powers; delegation to chief procurement officer only

(b) The power of the agency head to make the determination or decisions specified in paragraphs (12)-(16) of section 151 (c) of this title and in section 154 (a) of this title shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 151 (e) of this title shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000.

From the above we conclude that if the power in this instance was delegable at all, it would be only to an officer or official of the Navy. Here the attempt was to delegate the power to WHMS. It appears probable to us that the purchases here were to be made under paragraphs (12)-(16) of section 151 (c), in which case there was no power to delegate, rather than under paragraph (10) as contended by appellees. Paragraph (10) designates "supplies and services for which it is impracticable to secure competition."

Appellees also contend that section 153 (b) provides the authority for the execution of the contract under consideration. We think they would be right if the purpose of the contract with WHMS had been to buy and accumulate (for the future use of Navy Department) materials, as contended by appellees, is repugnant to the over-all content and purpose of the contract. Not only are the contract-

ors designated and treated as such in the contract but obviously the only purpose of the contract was to obtain the experience, skill and knowledge necessary to assemble proper materials and services and fashion them into an ammunition depot in the most efficient manner. If the United States had only been interested in obtaining the services of a purchasing agent to buy materials it could, no doubt, have selected a competent Naval Officer at no extra cost to perform that function and, in all events, it could have surely secured the services of such an agent for considerably less than half a million dollars.

Reversed.

Holt and Robinson, JJ., dissent.

George Rose Smith, J., not participating.

Robinson, Justice (dissenting).

No one will contend that if the Government is a *bona fide* purchaser of equipment, a state sales tax should be collected. If the Government is not the purchaser in this instance, it is hard to imagine a situation where it is ever the purchaser. The Government is invisible and intangible and must, necessarily, act through agents and has the exclusive right to appoint its own agent, or agents. Certainly no state has the power to say who can, or who cannot, act as agent for the Government. Moreover, the Government, through its duly appointed agents, has the right, in fact it is the duty of such agents, to avoid incurring unnecessary expenses, including taxes.

The majority opinion is based primarily on Alabama v. King & Boozer, 341 U. S. 1, 62 S. Ct. 43, 46, 86 L. Ed. 3. An attempt is made to show that there is no real distinction between that case and the case at bar, but, in my opinion, the facts in the two cases are altogether different. None of the facts on which the court based the opinion in the King & Boozer case are present in this case.

In the King & Boozer case the court said: "As the sale of the lumber by King and Boozer was not for cash the precise question is whether the Government became obligated to pay for the lumber and so was the purchaser whom the statute taxes". Then the court pointed out the following facts upon which it based the opinion that the Government was not the purchaser:

(1) The contractor was required to make all such contracts in his own name, and on his own credit, and not bind or purport to bind the Government or the contracting officer.

(2) The Government was not to be bound by the purchase contract.

(3) The purchase order stated that the purchase did not bind or purport to bind the United States Government or Government officers.

(4) The Government's credit was not pledged and the court said: "We cannot say that the contractors were not, or that the Government was, bound to pay the purchase price".

The facts in the present case which distin-

guish it from those set forth above are as follows:

(1) The Government was bound to pay for the equipment.

(2) The equipment was not bought in the name of the contractor or on the contractor's credit.

(3) The Government's credit was pledged.

(4) The request for bids provides that the contractor shall not acquire title to any of the property purchased.

If the contractor had attempted to divert to his own use property purchased for this Government job, there is no court in the land that would not have enjoined such diversion, upon a showing of the facts in the case. This is true because the contractor had acquired possession of the property as agent of the Government. At no time did the contractor own the property, nor was the contractor liable for the payment of the purchase price, and the property had not been sold on the credit of the contractor. To say here that the Government must pay the sales tax is to say that it can never, at any time, employ a contractor to do any work without paying a sales tax to the state on all material the Government buys and pays for and the contractor uses in doing such work.

For the reasons set out herein, I respectfully dissent.

HOLT, J., concurs in this dissent.

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INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 115

KERN-LIMERICK, INC., AND UNITED STATES OF AMERICA, APPELLANTS

v.

CARL F. PARKER, COMMISSIONER OF REVENUES FOR THE STATE OF ARKANSAS

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The Pulaski County Chancery Court wrote no opinion. The opinion of the Supreme Court of the State of Arkansas (R. 49–57) is reported at 254 S. W. 2d 454.

JURISDICTION

The judgment of the Supreme Court of the State of Arkansas was entered on January 12, 1953. (R. 57.) A petition for rehearing, seasonably filed by appellants Kern-Limerick, Inc., and the United States on January 29, 1953 (R. 58–60),

was entertained and denied on February 23, 1953 (R. 60). The petition for allowance of an appeal was filed on May 21, 1953 (R. 60), and was allowed on the same date (R. 61). This Court, by order of October 12, 1953 (R. 64), noted probable jurisdiction. The jurisdiction of this Court to review the decision below by direct appeal is conferred by 28 U. S. C., Sections 1257 (2) and 2101 (c).

QUESTIONS PRESENTED

1. Whether the Arkansas gross receipts tax statute can constitutionally be applicable to a sale by a vendor of equipment used in the performance of a cost-plus-fixed-fee contract with the United States, where the purchase was in the name of the United States and not of the contractor, title to the equipment passed directly from the vendor to the United States, and the United States alone was obligated to the vendor for payment of the purchase price.

2. Whether the purchasing arrangement established in the cost-plus contract involved here was authorized by the Armed Services Procurement Act of 1947.

STATUTES INVOLVED

The pertinent provisions of the Arkansas Gross Receipts Tax Act of 1941 and of the Armed Services Procurement Act of 1947 are set forth in the Appendix, *infra,* pp. 53–69.

STATEMENT

1. *The litigation.*—This is a suit to recover Arkansas gross receipt taxes paid under protest by Kern-Limerick, Inc., an Arkansas corporation,

with respect to a sale by it of two diesel tractors for use in the construction of the Naval Ammunition Depot at Shumaker, Arkansas.

On December 14, 1950, in the course of the construction of the Shumaker Depot, two Allis-Chalmers HD–5G diesel tractors were purchased from Kern-Limerick, Inc., a dealer in construction machinery and equipment, at a price of $8,573.33 each, a total of $17,146.66. (R. 1, 36.)[1] The State Commissioner of Revenues demanded from Kern-Limerick, Inc., a gross receipts tax of $342.93 as due on the transaction under the Arkansas Gross Receipts Tax Act of 1941. (R. 1, 36.)

On September 11, 1951, Kern-Limerick, Inc., filed a gross receipts tax return covering the transaction, paid the amount of the tax under protest, and demanded in writing a refund of the tax and a hearing to determine whether the transaction was taxable. (R. 1, 36.) The hearing was held on September 24, 1951, and the State Commissioner of Revenues issued an order determining that the sale was taxable. (R. 35.)

On October 22, 1951, Kern-Limerick, Inc., in accordance with state law, petitioned for an appeal from that order to the Chancery Court, Second Division, Pulaski County, Arkansas, alleging that the sale was to the United States and was exempt from taxation under the provisions of the Arkansas Gross Receipts Tax Act of 1941. (R. 1.) It further alleged that imposition of the gross receipts tax upon the sale to

[1] The details of this sale and purchase are described, *infra*, pp. 13–16.

the United States was invalid as repugnant to the Constitution of the United States, and that the Arkansas Gross Receipts Tax Act of 1941, if construed and applied to impose a tax upon the transaction, was invalid under the Constitution of the United States. (R. 2.)

On October 25, 1951, the Commissioner of Revenues for the State of Arkansas filed a response to the petition, denying that the sale was to the United States and alleging that it was made to the contractor constructing the Shumaker Depot under a cost-plus-fixed-fee contract with the United States. (R. 36.) The United States intervened in the suit on April 16, 1952, and adopted and incorporated in its petition in intervention all of the allegations of the petition of Kern-Limerick, Inc. (R. 37.)

After a trial of the issues, the Chancery Court, on April 23, 1952, entered its decree that the sale was to the United States Government and exempt from taxation under the provisions of the Arkansas Gross Receipts Tax Act, ordered a refund of the tax to Kern-Limerick, and allowed the Commissioner of Revenues an appeal to the State Supreme Court. (R. 47–49.)

The Arkansas Supreme Court, two members dissenting and one member not participating, held, in an opinion filed May 21, 1953, that the sale was to the contractor, not to the United States, and was taxable. The court also held that under the Armed Services Procurement Act of 1947 the Navy Department was without authority to employ a cost-plus contractor to act for it in purchasing equipment. (R. 49–57.)

2. *The cost-plus-fixed-fee contract with the Navy.*—On September 1, 1950, the United States, through the Department of the Navy, negotiated and entered into a cost-plus-fixed fee contract, designated NOy–23197, with a joint venture composed of Winston Bros. Company, C. F. Haglin and Sons, Inc., the Missouri Valley Bridge & Iron Company, and Sollitt Construction Company, Inc. (hereinafter called the "Navy contractor" or "WHMS"), for the construction and completion of the Naval Ammunition Depot at Shumaker, Arkansas. (R. 3.) Article 40 of the contract (R. 32) recites that it was entered into under the authority of Sections 2 (c) (10) and 4 (b) of the Armed Services Procurement Act of 1947. The contract was in effect during the transaction involved in the present case. (R. 38.) For the convenience of the Court, and because the contract reveals the nature of the relationship between the contractor and the Government, we summarize its main provisions:

Article 1 of the contract lists fifteen general projects to be carried out by the contractor under the contract, and directs the contractor to organize his forces and take the necessary steps to commence operations. The projects include the completion of three partially constructed production lines, the construction of certain specified buildings, the installation of railroad tracks, switches, and sidings, the extension of utilities, and the procurement and installation of production equipment. The total cost of the projects is estimated at $30,800,000, exclusive of the contractor's fixed fee of $580,000. (R. 5.)

Article 2 provides that the projects be completed in conformance with plans and specifications supplied by the Government. Any plans and specifications necessary to supplement those provided by the Government are to be furnished by the contractor, subject to the approval of the Contracting Officer.[2] (R. 6.) A procedure is provided in Article 3 by which the contractor may obtain an adjustment of his fixed fee if changes in the projects are ordered which cause a material increase or decrease in the amount or character of the work. (R. 6.)

Provision is made in Article 4 for the designation of an officer of the Civil Engineer Corps, United States Navy, to serve as Officer-in-Charge of Construction. In this capacity, under the direction of the Contracting Officer, he is to assume complete charge on behalf of the Government of the work in the field. (R. 7.)

Article 5 imposes certain requirements with respect to the contractor's organization. It directs that a project manager be appointed to assume charge on behalf of the contractor of all work under the contract. The contractor is to submit a chart showing all of his personnel (other than laborers) to be assigned to the work, together with a statement of their duties and rates of pay, and the administrative procedures proposed to be used in accomplishing the work. No key employee is to be removed during the progress of the work except for cogent reasons and after consultation with the Navy Officer-in-

[2] The Chief of the Bureau of Yards and Docks, Department of the Navy. (R. 5.)

Charge. The contractor agrees to cooperate fully with any other contractor or Government labor that may be supplied by the Government. (R. 7.) Article 6 provides that all services and labor necessary to accomplish the work are to be supplied by the contractor, unless furnished by the Government. The Officer-in-Charge must approve the employment of all persons proposed for certain key jobs, and the assignment of all personnel to the contractor's guard force. He may require the dismissal of any employee deemed by him to be careless, incompetent, insubordinate or otherwise objectionable. (R. 8.)

Article 7 requires the contractor to supply all plant and equipment not purchased by the Government under the provisions of Article 8 or otherwise furnished by it to the contractor. No equipment costing more than $200, or renting for more than $100 per month, may be supplied by the contractor without prior approval in writing from the Contracting Officer. Rental compensation based upon cost is payable to the contractor with respect to equipment owned by him, computed in the manner specified in the article. In computing rental compensation, the cost of the equipment includes insurance premiums (if allowable), depreciation, property taxes, interest on investment, and general administration and plant expenses. (R. 8–9.) In Article 12, the contractor is requested not to insure equipment or materials furnished by the Government, the Government assuming risk of loss or damage to such property. (R. 15.)

Article 8 provides that title to plant and equipment purchased for the Government passes di-

rectly to it from the vendor, and by Article 7 final disposition of all Government plant and equipment is placed under the direction of the Contracting Officer. (R. 9, 10.) Article 8 also provides, in part (R. 10):

> (a) Except where provision is otherwise made by the Officer-in-Charge, all materials, articles, supplies, and equipment required for the accomplishment of the work under this contract shall be furnished by the Contractor. The Contractor shall act as the purchasing agent of the Government in effecting such procurement and the Government shall be directly liable to the vendors for the purchase price. The exercise of this agency is subject to the obtaining of approval in the instances and in the manner required by subparagraph (c) of this article. The Contractor shall negotiate and administer all such purchases and shall advance all payments therefor unless the Officer-in-Charge shall otherwise direct.
>
> (b) Title to all such materials, articles, supplies and equipment, the cost of which is reimbursable to the Contractor hereunder, shall pass directly from the vendor to the Government without vesting in the Contractor, and such title (except as to property to which the Government has obtained title at an earlier date) shall vest in the Government at the time payment is made therefor by the Government or by the Contractor or upon delivery thereof to the Government or the Contractor, whichever

of said events shall first occur. This provision for passage of title shall not relieve the Contractor of any of its duties or obligations under this contract or constitute any waiver of the Government's right to absolute fulfillment of all of the terms hereof.

(c) No purchase in excess of $500 shall be made hereunder without the prior written approval of the Officer-in-Charge, except that the Officer-in-Charge may, in his discretion, either reduce the limitation on the amount of any purchase which may be made without such prior approval or authorize the Contractor to make purchases in amounts not in excess of $2,500 for any one purchase without obtaining such prior approval.

In Article 10, the Government agrees to compensate the contractor for the sum of the net cost paid by him in performance of the contract, plus the fixed fee, the general intent of the parties being that the contractor will be compensated for all allowable out-of-pocket advances and expenditures made incident to the contract. Seventeen classes of allowable advances or expenditures are listed. (R. 11–14.) Article 11 provides the procedure by which the contractor is to request reimbursement. Weekly applications are authorized. (R. 14.) Article 9 requires the contractor to procure all necessary licenses (R. 11), and he is required by Article 13 to obtain such liability insurance as the Contracting Officer may direct (R. 15). Article 14 provides that the Contracting Officer be notified immediately of any claims

against the contractor which would constitute a reimbursable cost under the contract. It further requires the contractor to cooperate with the Government in the defense of such claims. (R. 16.)

Article 15 requires all workmanship, equipment, materials, and articles used in performing work to be of the most suitable grade of their respective kinds for the purpose, unless otherwise authorized by the Contracting Officer. (R. 16.) Article 16 provides that all materials and workmanship are subject to examination by Government inspectors at any and all times. The contractor is directed to furnish all necessary facilities for such inspection. Unsatisfactory material or workmanship may be rejected, and must be satisfactorily replaced or corrected. Wherever justifiable, material to be incorporated in the work shall be inspected at the place of production, manufacture, or shipment. (R. 17.)

Article 17 requires the contractor to keep adequate records bearing upon costs and expenses, in accordance with the accounting methods prescribed by the Bureau of Yards and Docks, Navy Department, for cost-plus-fee contracts. The records must be retained for five years following final payment, when, with the approval of the Contracting Officer, they may be discarded. The records shall be available to authorized personnel of the Government at all reasonable times. (R. 18.)

Article 18 provides that the Government may terminate the contract for the fault of the contractor or when the Contracting Officer determines that termination is in the best interests of the Government. The duties of the contractor upon

termination are specified, and provision is made for settlement of all of its claims under the contract. (R. 19–23.) Article 19 provides that the Contracting Officer's decision on any question of fact arising under the contract is final, unless appealed. The contractor may appeal to the Secretary of the Navy, whose decision, after a hearing at which the contractor may present evidence, is final and conclusive. Pending this decision the contractor must proceed with the performance of the contract in accordance with the Contracting Officer's decision. (R. 23–24.)

In Article 20, responsibility is imposed upon the contractor for safeguarding all material classified for security purposes, and reporting any subversive activity of which it becomes aware. (R. 24.) Article 21 forbids the assignment of any interest in the contract, except to a financing institution under specified conditions. (R. 25.) Article 22, relating to rates of wages, provides that the contractor or his subcontractors shall pay wages at least once a week, without any unauthorized deduction, at rates not less than those stated in Exhibit A to the contract. Payment of a lower rate of wages is a ground for termination of the contract. (R. 25–26.) Article 23 provides that no laborer or mechanic employed by the contractor shall be required or permitted to work more than eight hours in one calendar day unless compensated at a rate one and one-half times the basic rate of pay for all hours worked in excess of eight; violations of this provision are punishable by fine. (R. 26–27.) Article 24 forbids the employment of convict labor (R. 27), while Article 25 forbids discrimination against any applicant

for employment because of his race, creed, color, or national origin (R. 27). Article 26 requires the contractor to comply with all rules, regulations and interpretations of the Secretary of Labor relating to attempts to induce a person engaged in the construction of public works to give up any part of the compensation to which he is entitled. (R. 27.)

Article 27 requires the contractor to record, at the direction of the Officer-in-Charge, such labor statistics as are required for transmittal to the Department of Labor. (R. 27.) Article 28 provides that no member or delegate to Congress shall be admitted to any share of the contract, or to any benefit arising from it. (R. 27–28.) The contractor warrants, in Article 29, that no person or agency other than an established agency maintained by the contractor to secure business has been retained on a contingent fee or commission basis to secure the contract; for breach of this warranty the Government may annul the contract or deduct the amount of the commission or fee from the contract price. (R. 28.) Article 30 provides for the use of domestic articles, with certain necessary exceptions, in the performance of the work (R. 28), and Article 31 subjects the contract to the provisions of the Renegotiation Act of 1948, c. 333, 62 Stat. 258, Sec. 3 (R. 29).

Articles 32, 33 and 34 relate to claims for patent infringement arising from the performance of the contract, and mark out the area in which the contractor indemnifies the Government, the situations in which the Government authorizes use of patented articles, and the notice and assistance which the contractor will render the Government in the

event of a claim of patent infringement. (R. 29–30.) Article 35 specifies that failure of the Government to insist upon strict performance of a contract term, or to exercise an option right, shall not be construed as a waiver for the future of any such terms or options. (R. 30–31.)

Article 36 provides that if the contractor is composed of more than one legal entity the property owned by each entity shall be considered the property of the contractor, and each shall be jointly and severally liable for the undertakings of the contractor. (R. 31.)

Article 37 provides that all previous agreements of the parties with respect to the subject matter of the contract are superseded by the terms of this contract. (R. 31.) Article 38 is the standard definition section. (R. 31.)

3. *The transaction with Kern-Limerick, Inc.*— Kern-Limerick, Inc., is an Arkansas corporation with its principal place of business in Little Rock, Arkansas. During the time in question it was engaged in the business of selling construction machinery and equipment. (R. 1, 36.)

The procedure by which the particular transaction here involved was authorized, conducted and consummated, and the instruments required by the United States to be used in connection therewith, have been stipulated, and it is also agreed that the procedures followed in this instance were in accordance with the general procedures provided in the contract of the Navy with WHMS and generally followed in the purchases of supplies and material required for the performance of the cost-plus contract. (R. 38-48.)

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The contractor (WHMS) originated the request for the diesel tractors involved here upon a form designated "Purchase Request" (NavDocks FC–201), which, after being reviewed by various members of the contractor's staff, was transmitted to the Officer-in-Charge of Construction, representing the Contracting Officer of the Navy. (R. 38–39.) The latter reviewed and approved the request. (R. 39.) Had the request been disapproved by the Navy, the equipment would not have been purchased. (R. 39.) After approval by the Officer-in-Charge, the contractor prepared and mailed to possible vendors (R. 40) a "Request for Bid" (R. 46A)[3] which recited "Please quote herein, subject to conditions on reverse side, your lowest price for the following material to be delivered * * *." One of the conditions was as follows (R. 46B):

> 3. This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price, but the Contractor shall handle all payments hereunder on behalf of the Government. The vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof.

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[3] This "Request for Bid" was in the name of the Bureau of Yards and Docks, Navy Department, "by" the contractor (WHMS) as "purchasing agent." (R. 46A.)

The bids submitted were opened by and read in the presence of representatives of the contractor and two representatives of the Officer-in-Charge, and in this case the bid of appellant Kern-Limerick, Inc., was recommended by these representatives as the lowest acceptable bid. (R. 40.) A purchase order (Nav Docks FC–204, R. 2A) was prepared accordingly. The order contained a provision identical with the condition numbered 3, quoted above. (R. 2B, 41.) At this point it was necessary that there be funds appropriated and set aside for the specific purchase order. If such funds had not been appropriated and set aside, then the contractor would not have proceeded any further until funds had been appropriated and set aside (R. 41). The Officer-in-Charge approved the order by signing his name thereto, and the contractor also signed as Purchasing Agent for the United States (R. 2A, 41–42). It was then forwarded to Kern-Limerick, Inc.

Kern-Limerick, Inc., shipped the equipment to the Officer-in-Charge, in care of the contractor (WHMS) at Shumaker, Arkansas, where it was received, inspected, and approved by a Navy Inspector and a representative of the contractor, both being required to be present. (R. 42.) As noted above (*supra,* p. 14) the Purchase Order provided that title was to pass from Kern-Limerick, Inc., directly to the United States, without passing through WHMS, and also that the credit of the United States was alone pledged for payment of the purchase price. All this was in accord with Article 8 of the Navy's contract with WHMS (see *supra,* pp. 8–9).

Kern-Limerick, Inc., submitted its invoice to the contractor under the provisions of Purchase Order condition number 3 quoted above at p. 14. (R. 44.) The contractor paid it and was reimbursed by the Government. (R. 44, 45.)

SPECIFICATION OF ERRORS TO BE URGED

The assignment of errors is set out in the record (p. 62) as follows:

> The Supreme Court of the State of Arkansas erred:
>
> 1. In holding that under the pertinent contract between the United States, Winston Bros. Company, C. F. Haglin and Sons Company, Missouri Valley Contractors, Inc., and Sollitt Construction Company, Inc. (the contractor for the construction of the Naval Ammunition Depot at Shumaker, Arkansas), and the purchase orders issued thereunder to the complainant-appellee, the complainant-appellee made sales to that contractor rather than to the United States.
>
> 2. In holding that the sales made by the complainant-appellee are validly taxable under the Arkansas Gross Receipts Tax Act of 1941, Act No. 386 of the Acts of Arkansas for 1941 (Arkansas Statutes, 1947, sections 84–1901 to 84–1919).
>
> 3. In holding that the sales made by the complainant-appellee were not sales to the United States and are not immune from taxation by the State of Arkansas under the Constitution of the United States.

4. In holding that the United States (through the Navy Department) was without the authority or power to make the purchases in question from the complainant-appellee in the form in which those purchases were made, and in holding that the contract between the United States and the contractor for the construction of the Naval Ammunition Depot at Shumaker, Arkansas, was a delegation of power prohibited by the Armed Services Procurement Act of 1947.

5. In reviewing and overruling the determinations of the proper officials of the Navy Department that the contract with the contractor and the purchase agreements with complainant-appellee were proper under the Armed Services Procurement Act.

6. In holding that the Arkansas Gross Receipts Tax Act of 1941, as applied to the sales involved here, is not repugnant to, and violative of, the Constitution of the United States.

SUMMARY OF ARGUMENT

I

The Arkansas gross receipts tax statute designates the vendor as the "taxpayer", and builds its collection machinery around him. However, it is mandatory upon the vendor to collect the tax from the purchaser, and the provisions of the act clearly indicate on their face that the vendor is intended to serve merely as a tax collector, and that the legal incidence of the tax is upon the

purchaser. The decisions of the Supreme Court of Arkansas unequivocally hold that the tax is a sales tax laid upon the purchaser and not the vendor. The analogous cases considered by this Court have reached the same result.

II

It is no longer open to debate that a state may not impose a tax upon the Government itself, or upon its purchases or activities. The fact that the tax is collected through a private person, rather than from the United States, does not destroy the Government's immunity. The Arkansas gross receipts tax statute recognizes these principles by exempting the gross proceeds of sales to the United States.

III

In holding that the cost-plus contractor (WHMS), and not the United States, was the purchaser here, the Supreme Court of Arkansas rested primarily on the decision of this Court in *Alabama* v. *King & Boozer,* 314 U. S. 1, but it failed to consider the rationale of that decision and to note the significant differences between the two cases.

In *King & Boozer,* the Court held that the major test of whether the Government was the purchaser was whether the Government became obligated to pay the vendor of the property. In order to decide this issue in *King & Boozer,* the Court examined the agreement between the United States and the cost-plus contractor, the purchase order used in consummating the sale, and the course of business followed in making the pur-

chase. On that basis, it was held that the Government never became bound to the vendor. Examination of the same factors in this case indicates the significant differences in the two situations. Here, the Government did become obligated under the express terms of the Purchase Order, the provisions of the arrangement between WHMS and the Navy, and the general course of dealings. Kern-Limerick, Inc. could have sued the United States under the Tucker Act if payment had not been made. Unlike the cost-plus contractor in *King & Boozer,* WHMS was not itself bound to the vendor. It was on these very factors in which the present case differs that the decision in *King & Boozer* turned. Under these circumstances, the rationale of the *King & Boozer* decision, when applied here, points directly to a result opposite to that reached there.

IV

The contract between the cost-plus contractor (WHMS) and the Government was entered into under the authority of Section 2 (c) (10) of the Armed Forces Procurement Act of 1947, which permits negotiated contracts where advertising would be impracticable (Appendix, *infra,* pp. 62–63). With respect to purchases made under that provision, the Secretary of the Navy is empowered, subject to restrictions not here pertinent, to make contracts of any type which in his opinion would promote the interests of the Government. He may delegate his powers to officials of the Navy, and the delegate's findings and determinations are final.

The cost-plus contract was entered into on behalf of the Government by the Chief of the Bureau of Yards and Docks, Department of the Navy, who was duly authorized to act in the capacity of Contracting Officer. The contract recited that all necessary determinations had been made. No express authority was necessary to appoint WHMS the Navy's purchasing agent, to the limited extent that it was. Absent Congressional restriction, the Government may, incident to the general right of sovereignty, enter into any contract appropriate to the exercise of its powers, and enjoys unrestricted power to determine the terms and conditions upon which it will make needed purchases.

The particular purchase order used in the transaction with Kern-Limerick, Inc., was also consistent with the Procurement Act. It was approved for the Contracting Officer by a Navy officer designated in the contract to serve under his direction as Officer-in-Charge on behalf of the Government. The chain of authority, therefore, is in complete conformance with the requirements of the Act, which requires no more than that a duly authorized official of the Navy pass upon Navy purchases. No wrongful delegation of power took place. The power granted the Secretary of the Navy to enter into contracts was exercised by an authorized Contracting Officer of the Navy and his designated representative. The activities of WHMS in soliciting the order, administering the necessary papers, and advancing

payment merely complemented and did not infringe upon this power.[4]

ARGUMENT

I

THE ARKANSAS GROSS RECEIPTS TAX IS A SALES TAX IMPOSED UPON THE PURCHASER

While the appellee has not in terms conceded that the State gross receipts tax is a sales tax on the purchaser, he has not argued to the contrary in the courts below. At any rate, it is clear from the terms of the Gross Receipts Tax Act itself, the decisions of the Supreme Court of Arkansas, and the decisions of this Court, that the tax is imposed upon the buyer and not the seller, who acts simply as the collecting agent for the State.

1. *The Statute.* Act 386 of the Acts of Arkansas of 1941 (7 Arkansas Statutes Annotated (1947 Official ed.), Sec. 84–1902 *et seq.*) imposes a 2 percent gross receipts tax on sales within the State.[5] (See Appendix, *infra,* pp. 53 *ff.*) The collection machinery of the Act is built

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[4] We also suggest that neither appellee nor the State of Arkansas has standing to challenge the validity of either the cost-plus contract with WHMS or the purchase contract with Kern-Limerick, Inc.

[5] "Sale" is defined as "the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished." Sec. 84–1902 (c), Appendix, *infra,* p. 53. Sales to contractors are specifically made taxable by Sec. 84–1903 (e), Appendix, *infra,* p. 54.

around the vendor, who is required to collect the tax from the purchaser and remit payment to the Commissioner of Revenue. (Sec. 84–1908, Appendix, *infra,* p. 56.) By definition, any person liable to remit a tax is a taxpayer (Sec. 84–1902 (e), Appendix, *infra,* p. 53) and all "taxpayers" are required to keep records and file monthly returns showing gross receipts from sales. (Sec. 84–1906, 84–1907, Appendix, *infra,* pp. 54–56.) Failure of a vendor "taxpayer" to comply with any provision of the Act is ground for revocation of his permit (Sec. 84–1913, Appendix, *infra,* pp. 59–61), without which he may not transact business within the State under penalty of fine and imprisonment. (Sec. 84–1919, Appendix, *infra,* p. 62.)

That the vendor, although designated the "taxpayer", is intended merely to serve as tax collector is fully demonstrated by the provisions of the Act. Section 84–1908 (Appendix, *infra,* p. 56) expressly provides that the seller *"shall* collect the tax levied hereby from the purchaser." [Italics supplied.] If the tax is remitted within five days of the time set for the filing of the return, only 98 per cent of the amount of tax due need be paid. Section 84–1915 (Appendix, *infra,* p. 61), which authorizes the discount, specifically provides that—

> This discount is allowed the seller * * * to remunerate him for keeping Sales Tax Records, filing reports, collecting the tax, and remitting it when due as required by this act.

Cf. *Colorado Bank* v. *Bedford,* 310 U. S. 41, 53. Section 84–1909 permits any person doing business upon a credit basis to apply to the Commissioner of Revenues for permission to prepare his returns on the basis of cash actually received; this is a provision presumably designed to eliminate tax liability when the seller cannot in fact collect from the buyer. And, although it has never been invoked, authority is given the Commissioner to issue tokens in one and five mill denominations to enable the purchaser to pay the exact amount of tax collected from him. Sec. 84–1908 (Appendix, *infra,* p. 56).

The statute, in short, calls the seller the "taxpayer" but its provisions place the legal incidence of the tax inescapably upon the purchaser.

2. *The Arkansas Decisions.* The decisions of the Supreme Court of Arkansas unequivocally hold that the tax is a sales tax laid upon the purchaser and not the vendor.

In *Cook, Commissioner of Revenues* v. *Sears-Roebuck & Co.,* 212 Ark. 308, the court said that the vendor (p. 316) —

> is a "taxpayer" only in the sense that it collects and remits the tax and makes a report thereof; but is not a "taxpayer" in the sense of being the initial payer of the tax. The burden—under § 7 of the Act—falls on the party who purchases the merchandise * * *.

And in *Wiseman* v. *Phillips,* 191 Ark. 63, which held constitutional the substantially similar pred-

ecessor sales tax Act[6] the Arkansas court concluded (p. 73):

> The merchant is not taxed. He is a tax collector. The tax is required of the purchaser, and the merchant must collect and account for it.

This quotation was cited with approval in *Hardin, Commissioner of Revenues* v. *Vestal,* 204 Ark. 492, 495, which construed the Act under which the present tax was levied. To the same effect is *Mann* v. *McCarroll, Commr. of Rev.,* 198 Ark. 628, which refers (p. 637) to the vendor as the "agent of the state for * * * collection".

In *Arkansas Power & Light Co.* v. *Roth,* 193 Ark. 1015, the purchaser urged that his liability to the Commissioner of Revenues for payment of the tax obviated any obligation to make payment to the vendor, and that consequently the vendor could not foreclose a chattel mortgage given by the purchaser to secure payment for the vendor's services. The court acknowledged the purchaser's liability to the Commissioner of Revenues, but held that an implied-in-law obligation existed upon him to make payment to the vendor.

The Arkansas court has thus been consistent and emphatic in holding that, despite the formal terminology of the Act, the tax is a sales tax imposed upon the purchaser.

3. *The Decisions of this Court.* This Court has considered several comparable state and local taxes and has ruled in each case that they were taxes upon the buyer although collected from the seller. In *Alabama* v. *King & Boozer,* 314 U. S. 1,

[6] Act 233, Acts of Arkansas 1935.

7, the closely analogous Alabama tax was held to be laid on the purchaser, although as in this case "in terms * * * the tax is laid on the seller, who is denominated the 'taxpayer' ". The same ruling was made, in somewhat different contexts, in *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 43; *Colorado Bank* v. *Bedford*, 310 U. S. 41, 51; and *Fed. Land Bank* v. *Bismarck Co.*, 314 U. S. 95, 99; cf. *Carson* v. *Roane-Anderson Co.*, 342 U. S. 232, 233.

Even if the State court had decided otherwise, this Court would be free to determine, for the purpose of rights under the Federal Constitution and statutes, that the legal incidence and impact of the tax was upon the purchaser, rather than the seller. *N. J. Ins. Co.* v. *Div. of Tax Appeals*, 338 U. S. 665, 674; *United States* v. *Allegheny County*, 322 U. S. 174, 184; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 84; *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443.[7] As we have pointed out (*supra*, pp. 21–23), the statute in terms places on the seller the legal duty of collecting the tax from the purchaser. It contains provisions, relating both to the seller's liability and to the collection

[7] See, also, *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472, 476; *Carpenter* v. *Shaw*, 280 U. S. 363, 367–368; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625, 626; *Schuykill Trust Co.* v. *Pennsylvania*, 296 U. S. 113, 119; *Senior* v. *Braden*, 295 U. S. 422, 429; *Lawrence* v. *State Tax Comm'n*, 286 U. S. 276, 280; *Storaasli* v. *Minnesota*, 283 U. S. 57, 62; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387–388; *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, 509–510; *Shaffer* v. *Carter*, 252 U. S. 37, 55; *Kansas City Ry.* v. *Kansas*, 240 U. S. 227, 231; *St. Louis, S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 362–363; *Choctaw & Gulf R. R.* v. *Harrison*, 235 U. S. 292, 298; *Galveston, Harrisburg & San Antonio Ry.* v. *Texas*, 210 U. S. 217, 227.

machinery, which demonstrate from the face of the statute that the tax is on the purchaser.

II

THE UNITED STATES IN ITS PURCHASES IS IMMUNE FROM A SALES TAX UPON THE PURCHASER

It was pointed out in *United States* v. *Allegheny County,* 322 U. S. 174, 176–177, that since *McCulloch* v. *Maryland,* 4 Wheat. 316, no decision of this Court has questioned that, in the absence of congressional consent, the Government's activities and property are immune from taxation by the states and their political subdivisions.* *United States* v. *Allegheny County, supra, Mayo* v. *United States,* 319 U. S. 441, and *S. R. A., Inc.* v. *Minnesota,* 327 U. S. 558, 561–562, 566–567, indicate the undiminished vigor of this principle, from which it follows that the tax in controversy cannot stand if, as we urge, it is actually levied upon the United States.

The fact that the tax is collected from a private person, rather than from the United States, does not destroy the federal immunity where the taxes are actually levied on the Government itself. Of the many cases holding the Government immune from state taxation, only two (*Clallam County* v. *United States,* 263 U. S. 341, and *Mayo* v. *United States, supra*) involved attempts to collect taxes or fees directly from the United States. In the

* Two unreported cases to the contrary were apparently affirmed by an equally divided Court at the December Term, 1849. Their facts are stated in *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, 175–177, but, as pointed out therein, they have no weight as authority.

other cases, the local authority proceeded for collection against a private person.

For instance, in *Van Brocklin* v. *State of Tennessee,* 117 U. S. 151, which is typical of several, the United States obtained title to three lots upon nonpayment of federal taxes, and held them for some thirteen years. After one lot had been redeemed by Van Brocklin and the others sold, the state brought a bill in equity against Van Brocklin and the purchaser to enforce by sale liens for taxes assessed with respect to the years when title was in the United States. It was held that the property was not subject to the asserted liens. See also, e. g., *Lee* v. *Osceola Imp. Dist.,* 268 U. S. 643; *Mullen Benevolent Corp.* v. *United States,* 290 U. S. 89; *Maricopa County* v. *Valley Bank,* 318 U. S. 357; *S. R. A., Inc.* v. *Minnesota,* 327 U. S. 558, 561–562, 566–567.[9] Even though the state proceeds solely against the private person, it is the Government or its property which is in effect being taxed. In all of these situations the Government, as the real party in interest, is subject to the same administrative and fiscal burdens as though the tax were collected directly from the Treasury.[10]

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[9] Other cases invalidating tax assessments against third persons are: *Railway Co.* v. *Prescott,* 16 Wall. 603; *Railway Co.* v. *McShane,* 22 Wall. 444; *Colorado Co.* v. *Commissioners,* 95 U. S. 259; *Sargent* v. *Herrick,* 221 U. S. 404; *Hussman* v. *Durham,* 165 U. S. 144; *Northern Pacific R. R. Co.* v. *Traill County,* 115 U. S. 600.

[10] In other types of cases, the Court has also recognized (*Colorado Bank* v. *Bedford,* 310 U. S. 41, 52) that "The person liable for the tax, primarily, cannot always be said to be

Those cases which have allowed state taxation of private contractors closely associated with the United States (*James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Alabama* v. *King & Boozer*, 314 U. S. 1; *Curry* v. *United States*, 314 U. S. 14; *Wilson* v. *Cook*, 327 U. S. 474; *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495) have not impinged upon the immunity of the Government itself. All involve taxes upon the contractor's own advantages from his contract by way of receipts, profits or beneficial use of property, rather than an impost directly on the Government or its own activities.

James v. *Dravo Contracting Co., supra* concerned a tax laid on the Government contractor's gross receipts and there was no claim that the tax was imposed either on the Government's property, on the United States itself, or on its transactions. Similarly, the taxes in *Alabama* v. *King & Boozer, supra,* and *Curry* v. *United States, supra,* were sales and use taxes held to be imposed on purchases of materials by a cost-plus contractor. As in *Dravo, supra,* the taxes reached only the contractor's purchases and use of the property, not the Government; "the fact that materials are destined to be furnished to the Government does not exempt them from sales taxes imposed on the contractor's vendor." *United*

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the real taxpayer. The taxpayer is the person ultimately liable for the tax itself."

See *Stahmann* v. *Vidal*, 305 U. S. 61; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 43, 49; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 361–362, 363–364.

States v. *Allegheny County*, 322 U. S. 174, 186.[11] Indeed, as will be more fully discussed in the next section of this brief, the rationale of the *King & Boozer* decision assumes that a tax laid on the Government would be invalid. See pp. 30 *ff*, *infra*. *Esso Standard Oil Co.* v. *Evans*, *supra*, decided at the last Term, was also a case in which the Court held the state tax to be imposed on the activities of the Government's contractor and not on the Government or its property (345 U. S. 495, 499–500, 501).

In all of these cases, "the exactions directly affected persons who were acting for themselves and not for the United States." *Mayo* v. *United States*, 319 U. S. 441, 447. What was denied was "immunity for the contractor's own property, profits, or purchases." *United States* v. *Allegheny County*, 322 U. S. 174, 186. The tax or regulation was imposed on the contractor as part of *his* obligation of citizenship, not upon the United States, and the "Constitution does not extend sovereign exemption from state taxation to corporations or individuals, contracting with the United States, merely because their activities are useful to the Government." *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495, 500. However, no decision of this Court permits a tax

[11] The overruling in *Alabama* v. *King & Boozer*, 314 U. S. 1, 9 (see *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. 261, 277), of *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, and *Graves* v. *Texas Company*, 298 U. S. 393, involving gasoline taxes denominated as "privilege" taxes, has no bearing on the validity of the present tax, since in both cases the legal incidence of the tax was upon the vendor.

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directly upon the United States, and the historical line of authority condemns it.

III

THE UNITED STATES WAS THE PURCHASER

The State of Arkansas does not contend that it possesses power to impose a tax whose legal incidence is upon the United States. Nor is it disputed that the legal incidence of the Arkansas gross receipts tax is upon the purchaser. As is shown by the discussion in Parts I and II, *supra*, pp. 21–30, neither issue is open to serious question. It necessarily follows that Arkansas is without power to tax the transaction here in question if the United States was the purchaser of the property from Kern-Limerick, Inc. This conclusion is recognized in the Arkansas statute, Act 386, Section 84–1904 (g) (Appendix, *infra*, p. 54), which specifically exempts from taxation the "[g]ross receipts or gross proceeds derived from sales to the United States Government."

A. The State Supreme Court's holding, in the opinion below, that the United States is not the purchaser rests almost wholly on the court's erroneous reading of *Alabama* v. *King & Boozer*, 314 U. S. 1 (see R. 52).[12] The *King & Boozer* case involved an Alabama 2% tax on the gross retail sales price of tangible personal property.

[12] "In coming to the conclusion that the United States was not, in this instance, the 'purchaser', we base our decision primarily on the opinion in the case of *Alabama* v. *King & Boozer*, 314 U. S. 1, decided in 1941. The question for decision in that case was the same as presented here and was based on facts, with the exceptions later noted, very similar to the facts of this case."

Just as in this case, the tax was laid in terms on the vendor of the property, but the statute required that the tax be added to the sales price and collected from the purchaser. It was held in this Court, in accordance with the Alabama cases, that the legal incidence of the tax was on the purchaser. The issue presented was whether the tax infringed the constitutional immunity of the United States when applied to a sale of lumber on the order of a cost-plus-fixed-fee contractor for use in constructing an army camp for the Government. It was held that the tax as applied was constitutional, since the contractor, and not the Government, was the purchaser upon whom the legal incidence of the tax fell.

In rejecting the Government's argument that the United States was the purchaser, the Court examined the cost-plus contract under which the contractor operated (314 U. S. at 10–11, 13–14), the purchase order under which the particular sale was consummated (314 U. S. at 11–12), and the general course of business followed by the United States, the cost-plus contractor, and the vendor in completing the sale-and-purchase transaction (314 U. S. at 11–12). The main criterion, many times repeated in the short opinion, by which the Court judged whether the United States was the purchaser was: Did the United States become obligated to pay for the supplies, *i. e.*, was the credit of the United States pledged to the vendor (see 314 U. S. at 10, 11, 11–12, 12, 13, 14)? The Court concluded from the cost-plus contract, the purchase order, and the course of business that, despite the extensive control exercised by the Government over purchases, the

credit of the United States was never pledged, and the contractor purchased on its own behalf.

A detailed examination, for this case, of the same three criteria the Court relied on *King & Boozer* (cost-plus contract, purchase order, course of business) will demonstrate that here, unlike the earlier case, the United States was at all times obligated to Kern-Limerick, Inc., the vendor, for the price of the diesel tractors, and was itself the purchaser.

(a) *The purchase order.*—Perhaps most relevant to the question of whether the Government obligated itself to the vendor, is the contract under which the purchase was consummated.[13]

In the purchase order used in the *King & Boozer* case, *supra,* there appeared an express negation of any obligation for the purchase price on the part of the Government. It recited that (314 U. S. 1, 11–12) "This purchase order does not bind, or purport to bind, the United States Government or Government officers." In the face of this express provision, the Court was naturally unable to find that the Government legally obligated itself to pay for the supplies and was the "purchaser" in the transaction.

In the present case, instead of expressly disclaiming liability on the part of the Government, the purchase order specifically provides "This

[13] As was said by the Court in *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421–422—

> In this, as in any other case of a written contract, those who are parties to and bound by it are to be ascertained by an inspection of the document, and its provisions are controlling in the absence of some positive rule of law or provision of statute requiring them to be disregarded.

purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price * * *". (R. 2B, 46B.) This assumption of liability on the part of the Government pledges the credit of the United States to the vendor, and provides consideration for the agreement. If Kern-Limerick, Inc. had not been paid it could have maintained a suit against the United States under the Tucker Act (now 28 U. S. C. 1346, 1491), while the vendor in *King & Boozer* could have sued only the cost-plus contractor. This divergency between the provisions of the two purchase orders distinguishes this case from the *King & Boozer* transaction on the very issue fundamental to the decision of that case.

The other provisions of the present purchase contract flow naturally from the assumption of the purchase obligation by the Government. Title to all purchases vests in the Government directly from the vendor.[14] (R. 2B, 46B.) There is no momentary vesting of title in the contractor, as suggested by the Arkansas Supreme Court (R. 54); title never reaches the contractor, and the purchase order expressly so provides. In *King & Boozer,* it was possible under the terms of the arrangement between the Government and the contractor for title to purchases to remain in the contractor for an appreciable period of time. The Government took title (314 U. S. 1, 10, 13–14) "upon delivery at the site of the work or at an approved storage site and upon inspection and

[14] "Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor [*i. e.* WHMS] shall not acquire title to any thereof."

acceptance in writing by the [contractor]." Both title provisions are consistent with their respective contracts, but, because they are designed to implement fundamentally different purchasing concepts, they differ significantly from each other. This difference also serves to sharpen the distinctions between the present case and *King & Boozer.*

Because this was a purchase by the Government, the purchase order incorporates by reference standard contract clauses prescribed by the Secretary of the Navy for inclusion in Government fixed-price supply contracts, as well as prescribed provisions respecting termination of such supply contracts. (R. 2B, 46B.) These provisions would be completely out of place in a contract to which the Government was not a party. Similar standard-form Government clause provisions were not used in the *King & Boozer* case.

Perhaps minor in itself, yet consistent with the other differences in the two purchase orders, is the fact that in the present case goods are directed to be shipped to the Contracting Officer "c/o" (care of) the contractor (R. 2A), whereas in *King & Boozer* the purchase was invoiced to the "Construction Quartermaster '%' (for account of) the contractors". 314 U. S. 1, 12.[15]

The physical appearance of the purchase order used here is also consistent with its provisions

[15] It is not clear whether this provision was standard in invoices presented under the type of purchase orders used in *King & Boozer.* It appears that the usual practice was for the invoices to read "sold to the contractors". 314 U. S. 1, 12, fn. 2. If this is correct, it only serves to heighten the distinction between the two forms.

and its character as a Government contract. The form is supplied by the Navy Department, Bureau of Yards and Docks, the name of which appears at the extreme top, and the form bears the designation "NAVDOCKS–FC–204". (R. 2A.) Moreover, unlike the purchase order in *King & Boozer,* the signature of the Officer-in-Charge, a United States Navy Officer, appears at the bottom, on behalf of the Contracting Officer, who is the Chief of the Bureau of Yards and Docks, Department of the Navy. (R. 2A, 41.) The source of the authority for these two officers to pledge the credit of the United States is discussed fully in the next part of this brief (pp. 47 *ff., infra*).

Also appearing at the bottom of the form is the signature of WHMS as "Purchasing Agent" for the Government. (R. 2A.) The contract provides that the vendor agrees "to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor" in its capacity as purchasing agent, and that the contractor in this capacity "shall handle all payments hereunder on behalf of the Government." (R. 2B.)

In sum, the purchase order which was delivered to Kern-Limerick, Inc., differs significantly from that used in *King & Boozer* in all the respects considered important by this Court to the holding in that case:

(1) Here, the United States is expressly obligated to pay the vendor and the vendor agrees to make claim on the Government; in the earlier case, the United States expressly disclaimed any such obligation.

(2) Here, the cost-plus contractor assumes no obligation to the vendor and handles payment only as the Government's agent; in *King & Boozer,* the contractor was plainly bound in its own right.

(3) Here, title to the purchased property passes directly from the vendor to the Government, without passing through the contractor, while in the other case title could be for a time in the contractor.

(4) In form, this purchase order was from the Navy, by the contractor as its "purchasing agent", and was also signed by an authorized officer of the Navy, while the *King & Boozer* order was from the contractor in its own name and was not signed by any representative of the Government. Similarly, shipment here was to the Navy Officer-in-Charge, care of the contractor, while in the Alabama case shipments were generally to the contractor itself.

(5) The instant purchase order is a Government contract in form and provisions, with standard clauses required of Government contracts; this was not true of the order in *King & Boozer.*

(b) *The cost-plus contract.*—The provisions of the purchase order just discussed (*supra,* pp. 32–36) conform to the terms of the contract between the cost-plus contractor (WHMS) and the Government, and manifest the purchasing arrangements contemplated by that agreement. As would be expected from the differences appearing in the purchase orders used here and in *King & Boozer,* the portions of the cost-plus-fixed-fee contracts relating to purchases also differ significantly in the two cases.

In *King & Boozer,* the Government reserved the right to furnish materials itself at its election (314 U. S. 1, 13), but it was not contended that the transaction in question fell within that provision. Rather, it was urged that the purchase made by the contractor was, in effect, a purchase by the Government because of the wide control exercised by it over the transaction and because title was ultimately to vest in it. Yet, the cost-plus agreement provided that all purchase contracts entered into by the contractor were to be made in the contractor's own name; should not bind or purport to bind the Government; and should provide that they were assignable to the Government (314 U. S. 1, 11, 13). This Court found that these provisions constituted an insurmountable obstacle to a finding that the Government was the person legally obligated to pay for the purchases, and hence a "purchaser" for the purposes of the Alabama taxing statute. 314 U. S. 1, 11, 13–14. It was held that, read together, these provisions plainly contemplated that the Government was not to be bound on the purchase contracts, but was obligated only to reimburse the contractors when the materials purchased were delivered, inspected and accepted at the site. 314 U. S. 1, 11. It was only then that title to the materials vested in the Government. 314 U. S. 1, 10 .

In the present case, we do not urge that mere control over purchases, as such, renders the Government the purchaser of the equipment.[16] The

[16] As outlined in the Statement, *supra* (pp. 7–10), the contract contemplates extensive control over, supervision, and

Government's status as purchaser stems directly from the precise terms of the cost-plus contract, as the purchase of this equipment by the Government was made pursuant to, and in a manner consistent with, provisions of that contract relating to purchases by the Government.

Article 7 (a) of the contract provides (R. 8–9):

> The Contractor shall provide all plant and equipment required for the accomplishment of the work under this contract *except such articles or pieces of equipment as shall be purchased by the Government under the terms of Article 8 hereof or be otherwise furnished by the Government* * * *. [Italics supplied.]

Article 8 (*supra*, pp. 8–9) prescribes a procedure for effectuating Government purchases and specifically provides that in connection with such purchases "the Government shall be directly liable to the vendors for the purchase price." (R. 10.) To effectuate procurement of Government-purchased equipment, Article 8 directs the contractor to act as "purchasing agent of the Government." (R. 10.) In this capacity it is to "negotiate and administer all such purchases and * * * advance all payments therefor * * *", subject to the direction of the Officer-in-Charge. (R. 10.) All purchases exceeding $500 require the prior written approval of the Officer-in-Charge.[17] (R. 10.)

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veto of purchases required for completion of the contract. See also *infra*, pp. 40–44.

[17] The contract permits the Officer-in-Charge, in his discretion, to dispense with the requirement of prior written ap-

As for title to the purchased supplies, it is provided in Article 8 (R. 10) that title "shall pass directly from the vendor to the Government without vesting in the Contractor." See also Article 7 (i) to the same effect. (R. 10.)

The distinction between Government-purchased equipment and equipment supplied by the contractor on its own behalf assumes a realistic importance in view of the provisions of the contract relating to rental compensation for equipment owned and supplied by the contractor. For such equipment the contractor may obtain rental compensation based upon cost, under the provisions of Article 7, *supra,* pp. 7, 38. (R. 9.) Includible in cost are insurance premiums, if allowable, depreciation, property taxes, interest on investment, and general administration and plant expenses. (R. 9.) Although the contractor is entitled to be compensated for costs relating to equipment supplied by it, it cannot, of course, obtain similar compensation with respect to Government-furnished equipment. In this connection it may be noted that although insurance premiums may be includible in computing rental compensation on contractor-supplied equipment (R. 9), the contractor is specifically requested not to insure Government-furnished equipment (R. 15). With respect to such equipment the Government assumes the risk of loss or damage. (R. 15.)

Here, again, it is plain that the present contract differs in all essential respects from that before the Court in *King & Boozer,* and these differences are important because the Court noted that the

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proval for purchases not in excess of $2,500. (Art. 8 (c), R. 10.)

"soundness" of the Government's contention that it was the purchaser "turns on the terms of the contract and the rights and obligations of the parties under it" (314 U. S. 1, 9):

(1) In the *King & Boozer* case, the contractor was to furnish as principal all supplies not furnished by the Government; the contract contemplated that the contractor was to obligate itself for purchases; and purchases were to be made in its own name and were not to bind the Government. Contrary provisions were included in the present contract, and the contractor is to act only as "purchasing agent" on behalf of the Government, which alone is bound to pay.

(2) In the earlier case, title could vest for some time in the contractor, before the United States accepted the purchased property. Here, the cost-plus contract specifically provides that the contractor shall never have title.

(c) *The course of business.*—The course of business followed in this case [18] was designed to implement the dual objectives of the purchasing provisions of the contract: to affirmatively pledge the credit of the Government to the vendor, and to utilize the skills and capabilities of the contractor in effecting procurement.

The request for the equipment was initiated by an employee of the contractor upon a form provided him by the Navy Department for that purpose.[19] (R. 38–39.) This form, after review by employees of the contractor, was transmitted to the Navy Technical Division, T–100, where it

[18] This is fully described in the Statement, *supra*, pp. 13–16.

[19] The form is designated "Purchase Request" (NavDocks FC–201).

States v. *Allegheny County*, 322 U. S. 174, 186.[11] Indeed, as will be more fully discussed in the next section of this brief, the rationale of the *King & Boozer* decision assumes that a tax laid on the Government would be invalid. See pp. 30 *ff*, *infra*. *Esso Standard Oil Co.* v. *Evans*, *supra*, decided at the last Term, was also a case in which the Court held the state tax to be imposed on the activities of the Government's contractor and not on the Government or its property (345 U. S. 495, 499–500, 501).

In all of these cases, "the exactions directly affected persons who were acting for themselves and not for the United States." *Mayo* v. *United States*, 319 U. S. 441, 447. What was denied was "immunity for the contractor's own property, profits, or purchases." *United States* v. *Allegheny County*, 322 U. S. 174, 186. The tax or regulation was imposed on the contractor as part of *his* obligation of citizenship, not upon the United States, and the "Constitution does not extend sovereign exemption from state taxation to corporations or individuals, contracting with the United States, merely because their activities are useful to the Government." *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495, 500. However, no decision of this Court permits a tax

[11] The overruling in *Alabama* v. *King & Boozer*, 314 U. S. 1, 9 (see *Penn Dairies* v. *Milk Control Comm'n*, 318 U. S. 261, 277), of *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, and *Graves* v. *Texas Company*, 298 U. S. 393, involving gasoline taxes denominated as "privilege" taxes, has no bearing on the validity of the present tax, since in both cases the legal incidence of the tax was upon the vendor.

directly upon the United States, and the historical line of authority condemns it.

III

THE UNITED STATES WAS THE PURCHASER

The State of Arkansas does not contend that it possesses power to impose a tax whose legal incidence is upon the United States. Nor is it disputed that the legal incidence of the Arkansas gross receipts tax is upon the purchaser. As is shown by the discussion in Parts I and II, *supra*, pp. 21–30, neither issue is open to serious question. It necessarily follows that Arkansas is without power to tax the transaction here in question if the United States was the purchaser of the property from Kern-Limerick, Inc. This conclusion is recognized in the Arkansas statute, Act 386, Section 84–1904 (g) (Appendix, *infra*, p. 54), which specifically exempts from taxation the "[g]ross receipts or gross proceeds derived from sales to the United States Government."

A. The State Supreme Court's holding, in the opinion below, that the United States is not the purchaser rests almost wholly on the court's erroneous reading of *Alabama* v. *King & Boozer*, 314 U. S. 1 (see R. 52).[12] The *King & Boozer* case involved an Alabama 2% tax on the gross retail sales price of tangible personal property.

[12] "In coming to the conclusion that the United States was not, in this instance, the 'purchaser', we base our decision primarily on the opinion in the case of *Alabama* v. *King & Boozer*, 314 U. S. 1, decided in 1941. The question for decision in that case was the same as presented here and was based on facts, with the exceptions later noted, very similar to the facts of this case."

Just as in this case, the tax was laid in terms on the vendor of the property, but the statute required that the tax be added to the sales price and collected from the purchaser. It was held in this Court, in accordance with the Alabama cases, that the legal incidence of the tax was on the purchaser. The issue presented was whether the tax infringed the constitutional immunity of the United States when applied to a sale of lumber on the order of a cost-plus-fixed-fee contractor for use in constructing an army camp for the Government. It was held that the tax as applied was constitutional, since the contractor, and not the Government, was the purchaser upon whom the legal incidence of the tax fell.

In rejecting the Government's argument that the United States was the purchaser, the Court examined the cost-plus contract under which the contractor operated (314 U. S. at 10–11, 13–14), the purchase order under which the particular sale was consummated (314 U. S. at 11–12), and the general course of business followed by the United States, the cost-plus contractor, and the vendor in completing the sale-and-purchase transaction (314 U. S. at 11–12). The main criterion, many times repeated in the short opinion, by which the Court judged whether the United States was the purchaser was: Did the United States become obligated to pay for the supplies, *i. e.*, was the credit of the United States pledged to the vendor (see 314 U. S. at 10, 11, 11–12, 12, 13, 14)? The Court concluded from the cost-plus contract, the purchase order, and the course of business that, despite the extensive control exercised by the Government over purchases, the

credit of the United States was never pledged, and the contractor purchased on its own behalf.

A detailed examination, for this case, of the same three criteria the Court relied on *King & Boozer* (cost-plus contract, purchase order, course of business) will demonstrate that here, unlike the earlier case, the United States was at all times obligated to Kern-Limerick, Inc., the vendor, for the price of the diesel tractors, and was itself the purchaser.

(a) *The purchase order.*—Perhaps most relevant to the question of whether the Government obligated itself to the vendor, is the contract under which the purchase was consummated.[13]

In the purchase order used in the *King & Boozer* case, *supra,* there appeared an express negation of any obligation for the purchase price on the part of the Government. It recited that (314 U. S. 1, 11–12) "This purchase order does not bind, or purport to bind, the United States Government or Government officers." In the face of this express provision, the Court was naturally unable to find that the Government legally obligated itself to pay for the supplies and was the "purchaser" in the transaction.

In the present case, instead of expressly disclaiming liability on the part of the Government, the purchase order specifically provides "This

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[13] As was said by the Court in *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 421–422—

> In this, as in any other case of a written contract, those who are parties to and bound by it are to be ascertained by an inspection of the document, and its provisions are controlling in the absence of some positive rule of law or provision of statute requiring them to be disregarded.

purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price * * *". (R. 2B, 46B.) This assumption of liability on the part of the Government pledges the credit of the United States to the vendor, and provides consideration for the agreement. If Kern-Limerick, Inc. had not been paid it could have maintained a suit against the United States under the Tucker Act (now 28 U. S. C. 1346, 1491), while the vendor in *King & Boozer* could have sued only the cost-plus contractor. This divergency between the provisions of the two purchase orders distinguishes this case from the *King & Boozer* transaction on the very issue fundamental to the decision of that case.

The other provisions of the present purchase contract flow naturally from the assumption of the purchase obligation by the Government. Title to all purchases vests in the Government directly from the vendor.[14] (R. 2B, 46B.) There is no momentary vesting of title in the contractor, as suggested by the Arkansas Supreme Court (R. 54); title never reaches the contractor, and the purchase order expressly so provides. In *King & Boozer,* it was possible under the terms of the arrangement between the Government and the contractor for title to purchases to remain in the contractor for an appreciable period of time. The Government took title (314 U. S. 1, 10, 13–14) "upon delivery at the site of the work or at an approved storage site and upon inspection and

[14] "Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor [*i. e.* WHMS] shall not acquire title to any thereof."

acceptance in writing by the [contractor]." Both title provisions are consistent with their respective contracts, but, because they are designed to implement fundamentally different purchasing concepts, they differ significantly from each other. This difference also serves to sharpen the distinctions between the present case and *King & Boozer*.

Because this was a purchase by the Government, the purchase order incorporates by reference standard contract clauses prescribed by the Secretary of the Navy for inclusion in Government fixed-price supply contracts, as well as prescribed provisions respecting termination of such supply contracts. (R. 2B, 46B.) These provisions would be completely out of place in a contract to which the Government was not a party. Similar standard-form Government clause provisions were not used in the *King & Boozer* case.

Perhaps minor in itself, yet consistent with the other differences in the two purchase orders, is the fact that in the present case goods are directed to be shipped to the Contracting Officer "c/o" (care of) the contractor (R. 2A), whereas in *King & Boozer* the purchase was invoiced to the "Construction Quartermaster '%' (for account of) the contractors". 314 U. S. 1, 12.[15]

The physical appearance of the purchase order used here is also consistent with its provisions

[15] It is not clear whether this provision was standard in invoices presented under the type of purchase orders used in *King & Boozer*. It appears that the usual practice was for the invoices to read "sold to the contractors". 314 U. S. 1, 12, fn. 2. If this is correct, it only serves to heighten the distinction between the two forms.

and its character as a Government contract. The form is supplied by the Navy Department, Bureau of Yards and Docks, the name of which appears at the extreme top, and the form bears the designation "NAVDOCKS–FC–204". (R. 2A.) Moreover, unlike the purchase order in *King & Boozer,* the signature of the Officer-in-Charge, a United States Navy Officer, appears at the bottom, on behalf of the Contracting Officer, who is the Chief of the Bureau of Yards and Docks, Department of the Navy. (R. 2A, 41.) The source of the authority for these two officers to pledge the credit of the United States is discussed fully in the next part of this brief (pp. 47 *ff., infra*).

Also appearing at the bottom of the form is the signature of WHMS as "Purchasing Agent" for the Government. (R. 2A.) The contract provides that the vendor agrees "to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Contractor" in its capacity as purchasing agent, and that the contractor in this capacity "shall handle all payments hereunder on behalf of the Government." (R. 2B.)

In sum, the purchase order which was delivered to Kern-Limerick, Inc., differs significantly from that used in *King & Boozer* in all the respects considered important by this Court to the holding in that case:

(1) Here, the United States is expressly obligated to pay the vendor and the vendor agrees to make claim on the Government; in the earlier case, the United States expressly disclaimed any such obligation.

(2) Here, the cost-plus contractor assumes no obligation to the vendor and handles payment only as the Government's agent; in *King & Boozer,* the contractor was plainly bound in its own right.

(3) Here, title to the purchased property passes directly from the vendor to the Government, without passing through the contractor, while in the other case title could be for a time in the contractor.

(4) In form, this purchase order was from the Navy, by the contractor as its "purchasing agent", and was also signed by an authorized officer of the Navy, while the *King & Boozer* order was from the contractor in its own name and was not signed by any representative of the Government. Similarly, shipment here was to the Navy Officer-in-Charge, care of the contractor, while in the Alabama case shipments were generally to the contractor itself.

(5) The instant purchase order is a Government contract in form and provisions, with standard clauses required of Government contracts; this was not true of the order in *King & Boozer.*

(b) *The cost-plus contract.*—The provisions of the purchase order just discussed (*supra,* pp. 32–36) conform to the terms of the contract between the cost-plus contractor (WHMS) and the Government, and manifest the purchasing arrangements contemplated by that agreement. As would be expected from the differences appearing in the purchase orders used here and in *King & Boozer,* the portions of the cost-plus-fixed-fee contracts relating to purchases also differ significantly in the two cases.

In *King & Boozer,* the Government reserved the right to furnish materials itself at its election (314 U. S. 1, 13), but it was not contended that the transaction in question fell within that provision. Rather, it was urged that the purchase made by the contractor was, in effect, a purchase by the Government because of the wide control exercised by it over the transaction and because title was ultimately to vest in it. Yet, the cost-plus agreement provided that all purchase contracts entered into by the contractor were to be made in the contractor's own name; should not bind or purport to bind the Government; and should provide that they were assignable to the Government (314 U. S. 1, 11, 13). This Court found that these provisions constituted an insurmountable obstacle to a finding that the Government was the person legally obligated to pay for the purchases, and hence a "purchaser" for the purposes of the Alabama taxing statute. 314 U. S. 1, 11, 13–14. It was held that, read together, these provisions plainly contemplated that the Government was not to be bound on the purchase contracts, but was obligated only to reimburse the contractors when the materials purchased were delivered, inspected and accepted at the site. 314 U. S. 1, 11. It was only then that title to the materials vested in the Government. 314 U. S. 1, 10 .

In the present case, we do not urge that mere control over purchases, as such, renders the Government the purchaser of the equipment.[16] The

[16] As outlined in the Statement, *supra* (pp. 7–10), the contract contemplates extensive control over, supervision, and

Government's status as purchaser stems directly from the precise terms of the cost-plus contract, as the purchase of this equipment by the Government was made pursuant to, and in a manner consistent with, provisions of that contract relating to purchases by the Government.

Article 7 (a) of the contract provides (R. 8–9):

> The Contractor shall provide all plant and equipment required for the accomplishment of the work under this contract *except such articles or pieces of equipment as shall be purchased by the Government under the terms of Article 8 hereof or be otherwise furnished by the Government* * * *. [Italics supplied.]

Article 8 (*supra*, pp. 8–9) prescribes a procedure for effectuating Government purchases and specifically provides that in connection with such purchases "the Government shall be directly liable to the vendors for the purchase price." (R. 10.) To effectuate procurement of Government-purchased equipment, Article 8 directs the contractor to act as "purchasing agent of the Government." (R. 10.) In this capacity it is to "negotiate and administer all such purchases and * * * advance all payments therefor * * *", subject to the direction of the Officer-in-Charge. (R. 10.) All purchases exceeding $500 require the prior written approval of the Officer-in-Charge.[17] (R. 10.)

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veto of purchases required for completion of the contract. See also *infra*, pp. 40–44.

[17] The contract permits the Officer-in-Charge, in his discretion, to dispense with the requirement of prior written ap-

As for title to the purchased supplies, it is provided in Article 8 (R. 10) that title "shall pass directly from the vendor to the Government without vesting in the Contractor." See also Article 7 (i) to the same effect. (R. 10.)

The distinction between Government-purchased equipment and equipment supplied by the contractor on its own behalf assumes a realistic importance in view of the provisions of the contract relating to rental compensation for equipment owned and supplied by the contractor. For such equipment the contractor may obtain rental compensation based upon cost, under the provisions of Article 7, *supra,* pp. 7, 38. (R. 9.) Includible in cost are insurance premiums, if allowable, depreciation, property taxes, interest on investment, and general administration and plant expenses. (R. 9.) Although the contractor is entitled to be compensated for costs relating to equipment supplied by it, it cannot, of course, obtain similar compensation with respect to Government-furnished equipment. In this connection it may be noted that although insurance premiums may be includible in computing rental compensation on contractor-supplied equipment (R. 9), the contractor is specifically requested not to insure Government-furnished equipment (R. 15). With respect to such equipment the Government assumes the risk of loss or damage. (R. 15.)

Here, again, it is plain that the present contract differs in all essential respects from that before the Court in *King & Boozer,* and these differences are important because the Court noted that the

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proval for purchases not in excess of $2,500. (Art. 8 (c), R. 10.)

"soundness" of the Government's contention that it was the purchaser "turns on the terms of the contract and the rights and obligations of the parties under it" (314 U. S. 1, 9):

(1) In the *King & Boozer* case, the contractor was to furnish as principal all supplies not furnished by the Government; the contract contemplated that the contractor was to obligate itself for purchases; and purchases were to be made in its own name and were not to bind the Government. Contrary provisions were included in the present contract, and the contractor is to act only as "purchasing agent" on behalf of the Government, which alone is bound to pay.

(2) In the earlier case, title could vest for some time in the contractor, before the United States accepted the purchased property. Here, the cost-plus contract specifically provides that the contractor shall never have title.

(c) *The course of business.*—The course of business followed in this case[18] was designed to implement the dual objectives of the purchasing provisions of the contract: to affirmatively pledge the credit of the Government to the vendor, and to utilize the skills and capabilities of the contractor in effecting procurement.

The request for the equipment was initiated by an employee of the contractor upon a form provided him by the Navy Department for that purpose.[19] (R. 38–39.) This form, after review by employees of the contractor, was transmitted to the Navy Technical Division, T–100, where it

[18] This is fully described in the Statement, *supra*, pp. 13–16.

[19] The form is designated "Purchase Request" (Navy Docs FC–201).

was checked to determine the necessity for the purchase, and the conformance of the items requested to required specifications. The request could have been denied at this point.[20] (R. 39.) However, the Navy Technical Division approved, and the words "Approval for Purchase" were noted upon the purchase request by the Navy Officer-in-Charge of Construction. (R. 39.) Thereupon, the contractor prepared a request for bids on a Navy Department form provided for that purpose,[21] and mailed the forms to a suitable list of possible vendors, including Kern-Limerick, Inc. (R. 40.) Recited upon the face of the request for bids was (R. 46A): "Please quote herein, subject to conditions on reverse side, your lowest price for the following material to be delivered." One of the conditions was condition 3, quoted above (*supra*, p. 14), and already discussed in connection with the purchase order (*supra*, pp. 32–33).

When the forms were filled in and returned by the prospective vendors, they were opened by and read in the presence of representatives of the contractor and two representatives of the United States, and initialed by both the Government and contractor representatives. (R. 40.) These representatives recommended that the contract be awarded to Kern-Limerick, Inc., as the lowest acceptable bidder. (R. 40.)

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[20] The stipulation states (R. 39): "This Division [i. e., the Navy Technical Division] does in fact on occasion determine a request to be unnecessary and returns it."

[21] This form is designated "Request for Bids" (Form FC–202 (Y & D)).

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The purchase order contract was then prepared on a form supplied by the Navy Department,[22] which recited as a condition of purchase the same condition number 3 quoted above at p. 14. (R. 2B.) The purchase order was then signed by the contractor as "Purchasing Agent" for the United States (R. 2A), and sent to the Navy Officer-in-Charge who approved it and signed on behalf of the Contracting Officer (the Chief of the Bureau of Yards and Docks, Navy Department) (R. 2A). Next, the contract was transmitted to the Navy Technical Division which checked and approved it as conforming with the request for bids and other pertinent documents. (R. 41.) It was then forwarded to the Navy Auditing Division for checking. At that time, appropriated federal funds had to be and were available for the payment of the purchase price. Had such funds not been available the purchase order would not have been forwarded to Kern-Limerick, Inc. (R. 41.) The contractor (WHMS) would not proceed until federal funds were appropriated and set aside for the purchase.

After being again returned to the Officer-in-Charge for his final approval or disapproval, the purchase order was mailed by the contractor to Kern-Limerick, Inc., which until that time was not aware that it had been the low bidder. (R. 42.)

Kern-Limerick, Inc., shipped the tractors to the Navy Officer-in-Charge, in care of the contractor, Shumaker, Arkansas (R. 42), where they were received, inspected, and approved by a rep-

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[22] This form is designated "Purchase Order" (NavDocks FC–204).

resentative of the United States and a representative of the contractor, both being required to be present. (R. 42.) Receipt of the equipment was noted upon a Navy Department form.[23] (R. 42.) Kern-Limerick, Inc., submitted its invoice to the contractor under the provisions of condition number 3 quoted above, *supra*, p. 14. (R. 44.) The contractor paid it and was reimbursed by the United States. (R. 44–45.)

This procedure is consistent in every respect with the cost-plus contract, and illustrates clearly the practical construction placed by the parties upon its terms. It was plainly contemplated that the United States and not the contractor was to purchase, and that the contractor's function under the contract was merely that of an agent to solicit orders and to perform administrative tasks such as preparing necessary forms, receiving invoices, and advancing payment. The agreement and approval of the United States were necessary, and were obtained, at every significant stage in this course of business followed in effectuating the purchase from Kern-Limerick, Inc. In particular, the purchase was not consummated until federal funds, appropriated to the Navy by Congress, were available and were set aside for this purchase; there could be no clearer proof that it was the credit of the United States, and not of WHMS, that was being pledged. Nor was the participation of the Government officials perfunctory; the established course of business provided for detailed scrutiny by them, with final power of approval or disapproval.

[23] The form was designated "Receiving and Inspection Report" (NavDocks FC–205).

The relationship of the parties, as shown by this course of business, is fundamentally different from that existing in *King & Boozer*. The references we have already given to the situation in that case (*supra*, pp. 32, 33–6, 37, 40) suffice to show that the contractor there was not, and was not supposed to be, the agent of the United States; it did not, and could not, pledge the credit of the United States, nor obligate the Government to pay the vendor, and it did not seek to do so.

The *King & Boozer* decision indisputably pivots on the very factors in which the present case differs. The thread binding the entire opinion, and by which taxability was marked, was that the contractor and not the Government was bound for the purchase price. (314 U. S. 1, 10, 12, 13, 14.) The contractor and not the Government was the purchaser, and, therefore, the state tax was not levied on a federal transaction. The situation is reversed in this case; the Government and not the contractor is the purchaser and the impact is therefore squarely on the Government.[24] Each of the factors mentioned by the Court as showing that the contractor was the purchaser is different in this case. In these circumstances the rationale of *King & Boozer* points directly to a result opposite to that reached there, and contrary to that reached by the court below. The ruling below cannot be accepted without jettisoning all the reasoning of this Court in the earlier case.

B. There is no room for the argument that the decision of the Arkansas Supreme Court that the

[24] The dissenting opinion below (R. 56–57) tabulates the major differences between the situation presented in *King & Boozer* and that now before the Court.

contractor, and not the United States, is the purchaser is a decision on a matter of state law, which is binding on this Court. In the first place, the Supreme Court did not purport to be applying state law but the decision of this Court in *King & Boozer* (*supra,* p. 30) (R. 52); the court also declared that it had in mind "all the provisions of the contract between WHMS and the United States"—clearly a federal matter. The opinion of the majority of the court below plainly turns, not on previously decided Arkansas cases or on other sources of Arkansas law,[25] but on purely federal matters.[26] In these circumstances, where a state court has decided a case on federal grounds, this Court is free to examine those grounds even though the decision below might have been rested on an adequate state ground if the state court had so desired. *Alabama* v. *King & Boozer,* and its companion, *Curry* v. *United States,* 314 U. S. 14, are themselves illustrations of this principle. *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 483, is another federal immunity case in which a state court decision, formally resting on a provision of the state statute, was actually based on federal matters and was therefore reviewable here.

In any event, a ruling by the court below that, as a matter of state law, the United States was

[25] No Arkansas cases are cited in the opinion.

[26] There is not the slightest indication in the opinion, for instance, that the Arkansas Supreme Court would disagree with the assumption of this Court, in *King & Boozer*, that the purchaser of tangible goods "is the person who orders and pays for them when the sale is for cash or who is legally obligated to pay for them if the sale is on credit." (314 U. S. at 10.)

not the purchaser would not be conclusive here. It is true that in *King & Boozer* (314 U. S. at 9–10) the Court remarked: "Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority." But this was meant to encompass only the general standards to be used in defining the status of purchaser, as well as the facts and legal issues which are otherwise within the exclusive competence of the state court. Where the Federal Government and a federal contract are involved, other principles necessarily come into play. Though the authority to supply meaning to terms used in a state statute lies solely within the province of the state court, that court cannot conclusively determine whether a contract to which the United States is a party creates relationships which fall within the scope of those terms, as defined by the state court. That is a federal question upon which this Court is the final arbiter. *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 483; *S. R. A., Inc.* v. *Minnesota,* 327 U. S. 558; *Metropolitan Bank* v. *United States,* 323 U. S. 454, 456; see *United States* v. *Allegheny County,* 322 U. S. 174, 183; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363. Furthermore, in deciding issues of federal immunity from state taxation, this Court has always held itself free to decide for itself the real incidence, nature, operation, and impact of the tax. See *supra,* p. 25. And, also, if the state discriminates against the United States or its contractor by applying a different rule from that which would be appli-

cable if another person were involved (*e. g.,* by applying a different standard for determining who is the "purchaser"), this Court will grant relief. Cf. *Esso Standard Oil Co.* v. *Evans,* 345 U. S. 495, 500–501.

IV

THE PURCHASE BY THE GOVERNMENT FROM KERN-LIMERICK, INC., COMPLIED WITH THE REQUIREMENTS OF THE ARMED SERVICES PROCUREMENT ACT OF 1947

1. Article 40 of the contract between the United States and WHMS (R. 32) specifies that it is made under the authority of Sections 2 (c) (10) and 4 (b) of the Armed Services Procurement Act of 1947 (Appendix, *infra,* pp. 62–3, 66–7). The same statement appears in the stipulation of facts entered into by the parties and filed with the Chancery Court of Pulaski County, Arkansas. (R. 38.)[27]

The Act is expressly made applicable "to all purchases and contracts for supplies or services made by * * * the Department of the Navy * * * (* * * being hereafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds." Section 2 (a), Appendix, *infra,* p. 62.

It provides that, except in certain specified circumstances, all contracts and purchases be made by advertising. Section 2 (c), Appendix, *infra,*

[27] The suggestion by the Arkansas Supreme Court (R. 55) that the contract was negotiated pursuant to Section 2 (c) (12)–(16) of the Act (Appendix, *infra,* pp. 64–5) is completely unsupported by the record.

p. 62. Among the exceptions are contracts "for supplies or services for which it is impracticable to secure competition." Section 2 (c) (10), Appendix, *infra,* p. 63. In that case the agency head is authorized to negotiate the necessary contracts without advertising. Section 2 (c). As just noted, it was under the authority of this exception that the contract here involved was negotiated. Sixteen other exceptions are also listed in the Act. Section 2 (c) (1)–(9), (11)–(17), Appendix, *infra,* pp. 63–5.

Section 7 (a) of the Act (Appendix, *infra,* p. 67) authorizes the agency head to delegate his powers, including that of making necessary determinations and decisions, in his discretion and subject to his direction, to any other officer or official of the agency. When made, the necessary determinations and decisions are final. Certain restrictions are placed on the agency head's authority to delegate his powers, but none of the restrictions relate to determinations or decisions necessary in contracts negotiated pursuant to Section 2 (c) (10), the section under the authority of which the contract between the Government and WHMS was negotiated. All the restrictions on the agency's head's power to delegate relate to contracts negotiated pursuant to one of the other sixteen situations in which advertising may be dispensed with. Section 2 (c).

Negotiated contracts (i. e., contracts not made by advertising) "may be of any type which in the opinion of the agency head will promote the best interest of the Government", except for certain specified restrictions on the use of cost-plus con-

tracts. Section 4 (a), Appendix, *infra*, p. 65. The relevant restrictions on the use of the cost-plus-fixed-fee contracts are that the contractor's fee not exceed 10 per centum of the estimated cost of the contract, and that this form of contract not be used "unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure supplies or services of the kind or quality required without [its] use * * *." Section 4 (b), *infra*, pp. 66–7.

Summarized, the portions of the Act relevant to this case provide (a) that purchases and contracts for supplies and services for which it is impracticable to secure competition may be negotiated by the agency head without advertising; (b) that such contracts may be of any type which in the opinion of the agency head will promote the best interests of the Government; (c) that the agency head may delegate his powers, including that of making necessary decisions and determinations, to any other officer of the agency; and (d) that, when made, the necessary determinations and decisions of the agency head or his delegate are final.

2. Despite the holding of the court below on this point (R. 54–56), it is clear that all of the requirements of the Procurement Act have been complied with in the present case. The WHMS contract was entered into on behalf of the Government by the Chief of the Bureau of Yards and Docks, Department of the Navy, in his capacity of Contracting Officer. (R. 4–5.) It was not necessary for the Secretary of the Navy to approve the contract personally; it was negotiated by authority of Section 2 (c) (10) of the Act (R. 32),

and the Secretary's powers could therefore be delegated to an agency official. Delegation to the Contracting Officer is evidenced by the Joint Regulations of the Armed Services which authorize Contracting Officers and their negotiators to negotiate those contracts for which advertising is not required. 32 Code of Federal Regulations (1949 ed.), Sec. 402.101.

Article 40 of the contract recites that "any required determination and findings * * * have been made." (R. 32.) The validity of the making of the cost-plus contract itself is, therefore, beyond question.

Specific authority was not necessary to appoint WHMS purchasing agent to the limited extent that it was. Subject to restrictions not here applicable, the Armed Services Procurement Act of 1947 authorized contracts "of any type which in the opinion of the agency head will promote the best interest of the Government." Section 4 (a). This provision adopts the general rule that, absent Congressional restriction, the Government, as an incident to the general right of sovereignty, may enter into any contract appropriate to the exercise of its powers (*Van Brocklin* v. *State of Tennessee,* 117 U. S. 151; *United States* v. *Hodson,* 10 Wall. 395; *Neilson* v. *Lagow,* 12 How. 98; *United States* v. *Linn,* 15 Pet. 290; *United States* v. *Tingey,* 5 Pet. 115), and, like a private individual, may enjoy unrestricted power to determine the terms and conditions upon which it will make needed purchases. *Atkin* v. *Kansas,* 191 U. S. 207; *Ellis* v. *United States,* 206 U. S. 246; *Heim* v. *McCall,* 239 U. S. 175; Cf. *Fed. Trade Commission* v. *Raymond Co.,* 263 U. S. 565. Here, no

Congressional restriction has been violated and the Contracting Officer (as delegate of the agency head) has duly determined that the Government's interests would be promoted by making WHMS the Government's purchasing agent.

Nor was there any violation of the Procurement Act in the particular transaction with Kern-Limerick, Inc., which is here in issue. The power of the Secretary of the Navy to enter into contracts was exercised in this instance by the duly authorized Contracting Officer, acting (by subdelegation) through the Navy Officer-in-Charge, who signed the Purchase Order (*supra*, pp. 15, 35). The contractor (WHMS) complemented this purchasing arrangement by soliciting orders, administering the necessary papers, and advancing payment.[28] Acting in this capacity, its status as purchasing agent did not infringe upon the Contracting Officer's statutory authority. The detailed control exercised by the Government over the contractor's activities assured that none occurred, and the chain of authority was in full conformance with the requisites of the Procurement Act for Navy contracts.

3. In any event, neither appellee nor the State of Arkansas has standing to challenge the validity of the cost-plus contract or the agreement with Kern-Limerick, Inc. Both purport to be valid Government contracts, and we see no occasion for permitting those, like respondent, who are not parties to these contracts to attack their legality.

[28] Use of private citizens to perform agency functions for the United States is not uncommon. See *Muschany* v. *United States*, 324 U. S. 49; *Johnson & Higgins* v. *United States*, 287 U. S. 459; *Yearsley* v. *Ross Constr. Co.*, 309 U. S. 18.

To permit such attack would depart from "the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion * * *." *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 127. Certainly, appellee cannot challenge the discretionary determinations and findings which have been made by the appropriate Navy officers in entering into these contracts. See *Dalehite* v. *United States*, 346 U. S. 15, 34.

CONCLUSION

The judgment of the Supreme Court of Arkansas should be reversed.

Respectfully submitted,

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DECEMBER 1953.

APPENDIX

1. 7 Arkansas Statutes Annotated (1947 Official ed.), Act 386 (Arkansas Gross Receipts Tax Act of 1941):

84–1902. *Definitions.*— * * *

* * * * *

(c) Sale: The term "sale" is hereby declared to mean the transfer of either the title or possession for a valuable consideration of tangible personal property, regardless of the manner, method, instrumentality, or device by which such transfer is accomplished. * * *

* * * * *

(e) Taxpayer: The term "taxpayer" means any person liable to remit a tax hereunder or to make a report for the purpose of claiming any exemption from payment of taxes levied by this act * * *.

* * * * *

(i) Consumer–User: The term "consumer" or "user" means the person to whom the taxable sale is made, or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this act * * *.

* * * * *

84–1903. *Two per cent tax levied.*— There is hereby levied an excise tax of two [2%] per centum upon the gross proceeds

or gross receipts derived from all sales to any person subsequent to the effective date of this act * * *, of the following:

(a) Tangible Personal Property.

* * * * *

(e) * * *

Sales of service and tangible personal property including materials, suplies and equipment made to contractors who use same in the performance of any contract are herby declared to be sales to consumers or users and not sales for resale. * * *

84–1904. *Exemptions from tax.*—There is hereby specifically exempted from the tax imposed by this act the following:

* * * * *

(g) Gross receipts or gross proceeds derived from sales to the United States Government.

* * * * *

84–1906. *Preparation and filing of verified returns and remitting the tax.*—The tax levied hereunder shall be due and payable on the first day of each month, except as herein provided, by any person liable for the payment of any tax due under this act * * *; and, for the purpose of ascertaining the amount of tax payable under this act, it shall be the duty of all taxpayers on or before the 15th day of August, 1941 to deliver to the Commissioner, upon forms prescribed and furnished by him, returns under oath, showing the gross receipts or gross proceeds derived from all sales taxable or nontaxable under this act during the preceding calendar month, and thereafter like returns shall be prepared and delivered to said Commissioner by all such taxpayers on or before the 15th day of

each month for the preceding calendar month. Such returns shall show such further information as the Commissioner may require to enable him to compute correctly and collect the tax herein levied.

In addition to the information required on returns, the Commissioner may request and the taxpayer must furnish any information deemed necessary for a correct computation of the tax levied herein. Such taxpayer shall compute and remit to the Commissioner the required tax due for the preceding calendar month, the remittance or remittances of the tax to accompany the returns herein required. * * *

84–1907. *Taxpayers to keep adequate records for tax determination—Examination of records—Arbitrary assessment—Record of sales for resales.*—It shall be the duty of every taxpayer required to make a return and pay any tax under this act * * * to keep and preserve suitable records of the gross receipts or gross proceeds of sales taxable and nontaxable under this act, including such books of account and such analyses of sales as may be necessary to determine the amount of the tax due hereunder and all invoices, credit memoranda, refund slips, and other records of goods, wares, merchandise, and other subjects of taxation under this act as will substantiate and prove the accuracy of such returns. All such records shall remain in Arkansas and be preserved for a period of three [3] years, and shall be open to examination at any time by the Commissioner. In the event that such records are kept outside of the State of Arkansas in the usual course of business they shall be produced within the State of Arkansas

upon proper demand by the Commissioner within a period of fifteen [15] days after receipt of such demand. In the event the taxpayer fails to maintain or preserve proper records as described in this section the Commissioner shall be empowered to arbitrarily assess, upon such information as is available to him, the amount of tax due by the taxpayer. The burden of proof of refuting such assessment as set up by the Commissioner shall be upon the taxpayer.

* * * * *

84–1908. *Collection of tax by persons furnishing taxable service—Tokens—Redemption of—Priority of tax claim.*— * * *

* * * * *

The seller, or person furnishing such taxable service, shall collect the tax levied hereby from the purchaser.

In order to make such collections convenient the Commissioner of Revenues may in his discretion issue tokens in the denominations of one-tenth [1/10] of one cent and five-tenths [5/10] of one cent, in such quantity as the Commissioner deems necessary. Tax tokens shall not be accepted by the State in payment of taxes due. Tax tokens shall be redeemed at face value by the Commissioner, at Little Rock, Arkansas, and at such other points as he may designate.

The Commissioner may, in the alternative, in his discretion set up by regulation a bracket system of collecting the tax due hereunder. * * *

* * * * *

84–1909. *Tax return on basis of cash actually received.*—The tax imposed by this act * * * shall be in addition to any or all taxes except as otherwise provided herein.

Any person taxable under this act doing business wholly or partly on a credit basis may make application to the Commissioner of Revenues for permission to prepare his returns on the basis of cash actually received. Such application shall be granted by the Commissioner under such rules and regulations as he may prescribe. Any person making such application shall be taxable on all monies collected during the taxable period. * * *

* * * * *

84–1911. *Right of taxpayer to hearing—Appeals—Refunds—No injunctive relief.*—If the Commissioner, after examining the return of any taxpayer or upon the failure of any taxpayer to file a return, determines that the taxpayer is liable to the State for any taxes specified under this act * * *, he shall give such taxpayer notice of his intention to collect such assessment by issuing a certificate of indebtedness as hereinafter provided, or by any other legal means. Such taxpayer may, if he so desires and duly notifies the Commissioner in writing within twenty [20] days after receipt of such notice of intention, demand a hearing on the question of the issuance of such certificate of indebtedness. Thereupon the Commissioner shall set a time and place for hearing and shall give the taxpayer reasonable notice thereof. The taxpayer shall be entitled to appear before the Commissioner and be represented by consel [counsel] and present testimony and argument. After the hearing the Commissioner shall render his decision in writing and by order establish any deficiency or tax found by him to be due and payable. If any taxpayer is aggrieved

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by any decision of the Commissioner he shall be required to pay the amount of taxes, interest and/or penalties found due by the Commissioner and after the payment of such taxes, interest and/or penalties, he shall be permitted to appeal within a period of thirty [30] days after such decision to the Chancery Court of Pulaski County where the matter shall be tried *de novo.* An appeal shall also lie from the Pulaski Chancery Court to the Supreme Court of Arkansas as in other cases now provided by law.

In the event any taxpayer is found by such court or courts entitled to recover any sums paid pursuant to the orders of the Commissioner as hereinbefore provided, such sums shall be refunded to him from a fund to be created by the Commissioner out of monies collected under this act * * *, to be known as the "Special Gross Receipts Refund Account," to be maintained for such purposes, which account shall not exceed the sum of $10,000.00.

No injunction shall issue to stay proceedings for assessment or collection of any taxes levied under this act * * *.

* * * * *

84-1912. *Authority to file certificates of indebtedness—Effect as lien—Execution—Fees—Employment of attorneys.*—If the taxpayer fails to demand a hearing within the time allowed, after an assessment of the tax due the State and proper notice thereof as hereinbefore provided, or if the taxpayer shall fail to pay the tax assessed by the Commissioner after such a hearing and an order by the Commissioner establishing such tax, as hereinbefore provided, then the Commissioner may, as soon as

practicable thereafter, issue to the Circuit Clerk of any county of the State, a certificate certifying that the person therein named is indebted to the State for the tax established by the Commissioner to be due. The Circuit Clerk shall immediately enter upon the Circuit Court judgment docket the name of the delinquent taxpayer, the amount certified as being due, a short name of the tax, and the date of the entry upon the judgment docket. Such entry shall have the same force and effect as an entry on such judgment docket of a judgment rendered by the Circuit Court of such county, and shall constitute and be evidence of the State's lien upon the title to any interest in any real property of the taxpayer named in such certificate. The entry of such certificate as a judgment shall constitute, in addition to the force and effect above described, a lien also upon all personal property of the taxpayer named therein from the time of the entry of such certificate.

* * * * *

84–1913. *Permits requisite to engaging in business—Display—Surrender upon quitting business—Tax a lien upon sale of business—Expiration—Revocation.*—It shall be unlawful for any taxpayer to engage or transact business within this State unless a written permit or permits shall have been issued to him. Every such taxpayer desiring to engage in or conduct a business within this State shall file with the Commissioner of Revenues an application for a permit to conduct such business, setting forth such information as the Commissioner may require. The application shall be signed by the owner of the business

as a natural person, or, in the case of a corporation, by a legally constituted officer thereof. Any taxpayer who engages in business, subject to the provisions of this section without a permit or permits, or after a permit has been suspended, shall be subject to penalties as hereinafter provided.

* * * * *

All permits issued under the provisions of this act * * * shall expire at the time of cessation of business at the place or location of the business within the State. Whenever a holder of a permit fails to comply with any provision of this act, the Commissioner shall give notice to the taxpayer of an intention to revoke such permit. The taxpayer may, within ten [10] days after receipt of such notice of intention, apply to the Commissioner for a hearing in the same manner as provided for in section 10 [§ 84–1911] of this act. Such hearing shall be conducted at a time and place to be designated by the Commissioner and the taxpayer shall be entitled to introduce testimony and be represented by counsel, and the Commissioner shall determine at such hearing whether such taxpayer's permit should be revoked. The taxpayer shall be entitled, within thirty [30] days from the date of the order of the Commissioner revoking such permit, to appeal to the Chancery Court in his county where the action shall be tried *de novo,* and an appeal shall lie from such Chancery Court to the Supreme Court of Arkansas as in other cases provided by law.

In the event the taxpayer fails to apply for a hearing within ten [10] days after receipt of such notice of intention, the Com-

missioner may revoke such permit. Any said permit may be renewed upon the filing of proper returns and the payment of all taxes due under this act * * * and/or removal of any other cause or causes of revocation or suspension. * * *

* * * * *

84–1915. *Discount allowed taxpayer for prompt payment—Forfeiture of discount.*—At the time of transmitting the returns required under this act * * *, to the Commissioner, the taxpayer shall remit therewith to the Commissioner, except as hereinafter provided, ninety-eight [98%] per centum of the tax due under the applicable provisions of this act, and failure to remit such tax at the time of filing the return shall cause said tax to become delinquent; provided, however, in the event the payment of any tax due under the applicable provisions of this act * * * becomes delinquent for a period of five [5] days the taxpayer forfeits his claim to the two [2%] per centum discount and must remit to the Commissioner one hundred [100%] per centum of the amount of tax due plus any penalty and interest due. This discount is allowed the seller or taxpayer to remunerate him for keeping Sales Tax Records, filing reports, collecting the tax, and remitting it when due as required by this act * * *.

84–1916. *Administration of act.*—(a) The administration of this act * * * is vested in and shall be exercised by the Commissioner. The Commissioner shall promulgate rules and regulations, and prescribe forms for the proper enforcement of this act.

* * * * *

84–1919. *Penalty for doing business without permit.*—Any taxpayer who continues to do business after the effective date of this act without first obtaining a permit provided for in section 12 * * * of this act, or any taxpayer who shall continue to do business after the revocation or suspension of any such permit obtained pursuant to this act * * *, shall be guilty of a misdemeanor punishable by a fine of not less than $100.00 nor more than $1,000.00, or by imprisonment in the county jail for not less than one month, nor more than 6 months, or both such fine and imprisonment; each day of doing business in violation of this act shall constitute a separate offense, punishable accordingly. * * *

* * * * *

2. Armed Services Procurement Act of 1947, c. 65, 62 Stat. 21:

SEC. 2. (a) The provisions of this Act shall be applicable to all purchases and contracts for supplies or services made by the Department of the Army, the Department of the Navy, the Department of the Air Force, the United States Coast Guard, and the National Advisory Committee for Aeronautics (each being hereinafter called the agency), for the use of any such agency or otherwise, and to be paid for from appropriated funds.

* * * * *

(c) All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if—

(1) determined to be necessary in the public interest during the period of a national emergency declared by the President or by the Congress:

(2) the public exigency will not admit of the delay incident to advertising;

(3) the aggregate amount involved does not exceed $1,000;

(4) for personal or professional services;

(5) for any service to be rendered by any university, college, or other educational institution;

(6) the supplies or services are to be procured and used outside the limits of the United States and its possessions;

(7) for medicines or medical supplies;

(8) for supplies purchased for authorized resale;

(9) for perishable subsistence supplies;

(10) for supplies or services for which it it is impracticable to secure competition;

(11) the agency head determines that the purchase or contract is for experimental, developmental, or research work, or for the manufacture or furnishing of supplies for experimentation, development, research, or test; *Provided*: That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (11) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder;

(12) for supplies or services as to which the agency head determines that the character, ingredients, or components thereof are such that the purchase or contract should not be publicly disclosed;

(13) for equipment which the agency head determines to be technical equipment, and as to which he determines that the procurement thereof without advertising is necessary in order to assure standardization of equipment and interchangeability of parts and that such standardization and interchangeability is necessary in the public interest;

(14) for supplies of a technical or specialized nature requiring a substantial initial investment or an extended period of preparation for manufacture, as determined by the agency head, when he determines that advertising and competitive bidding may require duplication of investment or preparation already made, or will unduly delay procurement of such supplies;

(15) for supplies or services as to which the agency head determines that the bid prices after advertising therefor are not reasonable or have not been independently arrived at in open competition: *Provided,* That no negotiated purchase or contract may be entered into under this paragraph after the rejection of all bids received unless (A) notification of the intention to negotiate and reasonable opportunity to negotiate shall have been given by the agency head to each responsible bidder, (B) the negotiated price is lower than the lowest rejected bid price of a responsible bidder, as determined by the agency head, and (C) such negotiated price is the low-

est negotiated price offered by any responsible supplier;

(16) the agency head determines that it is in the interest of the national defense that any plant, mine, or facility or any producer, manufacturer, or other supplier be made or kept available for furnishing supplies or services in the event of a national emergency, or that the interest either of industrial mobilization in case of such an emergency, or of the national defense in maintaining active engineering, research and development, are otherwise subserved: *Provided*, That beginning six months after the effective date of this Act and at the end of each six-month period thereafter, there shall be furnished to the Congress a report setting forth the name of each contractor with whom a contract has been entered into pursuant to this subsection (16) since the date of the last such report, the amount of the contract, and, with due consideration given to the national security, a description of the work required to be performed thereunder; or

(17) otherwise required by law.

(41 U. S. C. 1946 ed., Supp. V, Sec. 151.)

* * * * *

SEC. 4. (a) Except as provided in subsection (b) of this section, contracts negotiated pursuant to section 2 (c) may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract negotiated pursuant to section 2 (c) shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract

upon an agreement or understanding for a commission, percentage, brokerage or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

(b) The cost-plus-a-percentage-of-cost system of contracting shall not be used, and in the case of a cost-plus-a-fixed-fee contract the fee shall not exceed 10 per centum of the estimated cost of the contract, exclusive of the fee, as determined by the agency head at the time of entering into such contract (except that a fee not in excess of 15 per centum of such estimated cost is authorized in any such contract for experimental, developmental, or research work and that a fee inclusive of the contractor's costs and not in excess of 6 per centum of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project). Neither a cost nor a cost-plus-a-fixed-fee contract nor an incentive-type contract shall be used unless the agency head determines that such method of contracting is likely to be less costly than other methods or that it is impractical to secure supplies or services of the kind or quality required without the use of a cost or cost-plus-a-fixed-fee

contract or an incentive-type contract. All cost and cost-plus-a-fixed-fee contracts shall provide for advance notification by the contractor to the procuring agency of any subcontract thereunder on a cost-plus-a-fixed-fee basis and of any fixed-price subcontract or purchase order which exceeds in dollar amount either $25,000 or 5 per centum of the total estimated cost of the prime contract; and a procuring agency, through any authorized representative thereof, shall have the right to inspect the plants and to audit the books and records of any prime contractor or subcontractor engaged in the performance of a cost or cost-plus-a-fixed-fee contract.

(41 U. S. C. 1946 ed., Supp. V, Sec. 153.)

* * * * *

SEC. 7. (a) The determinations and decisions provided in this Act to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

(b) The power of the agency head to make the determinations or decisions specified in paragraphs (12), (13), (14), (15), and (16) of section 2 (c) and in section 5 (a) shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 2 (c) shall be delegable only to a chief officer

responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000.

(c) Each determination or decision required by paragraphs (11), (12), (13), (14), (15), or (16) of section 2 (c), by section 4 or by section 5 (a) shall be based upon written findings made by the official making such determination, which findings shall be final and shall be available within the agency for a period of at least six years following the date of the determination. A copy of the findings shall be submitted to the General Accounting Office with the contract.

(d) In any case where any purchase or contract is negotiated pursuant to the provisions of section 2 (c), except in a case covered by paragraphs (2), (3), (4), (5) or (6) thereof, the data with respect to the negotiation shall be preserved in the files of the agency for a period of six years following final payment on such contract.

(41 U. S. C. 1946 ed., Supp. V, Sec. 156.)

* * * * *

SEC. 9. As used herein—

(a) The term "agency head" shall mean the Secretary, Under Secretary (if any), or any Assistant Secretary of the Army, of the Navy, or of the Air Force; the Commandant, United States Coast Guard, Treasury Department; and the Executive Secretary, National Advisory Committee for Aeronautics, respectively.

(41 U. S. C. 1946 ed., Supp. V, Sec. 158.)

* * * * *

SEC. 10. In order to facilitate the procurement of supplies and services by each agency for others and the joint procure-

ment of supplies and services required by such agencies, subject to the limitations contained in section 7 of this Act, each agency head may make such assignments and delegations of procurement responsibilities within his agency as he may deem necessary or desirable, and the agency heads or any of them by mutual agreement may make such assignments and delegations of procurement responsibilities from one agency to any other or to officers or civilian employees of any such agency, and may create such joint or combined offices to exercise such procurement responsibilities, as they may deem necessary or desirable. Appropriations available to any such agency shall be available for obligation for procurement as provided for in such appropriations by any other agency through administrative allotments in such amount as may be authorized by the head of the allotting agency without transfer of funds on the books of the Treasury Department. Disbursing officers of the allotting agency may make disbursements chargeable to such allotments upon vouchers certified by officers or civilian employees of the procuring agency.

41 U. S. C. 1946 ed., Supp. V, Sec. 159.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1953

No. 115

KERN-LIMERICK, INC., AND
THE UNITED STATES OF AMERICA,
APPELLANTS

vs.

CARL F. PARKER, COMMISSIONER OF
REVENUES FOR THE STATE OF ARKANSAS,
APPELLEE

APPEAL FROM
SUPREME COURT OF ARKANSAS

BRIEF OF APPELLEE

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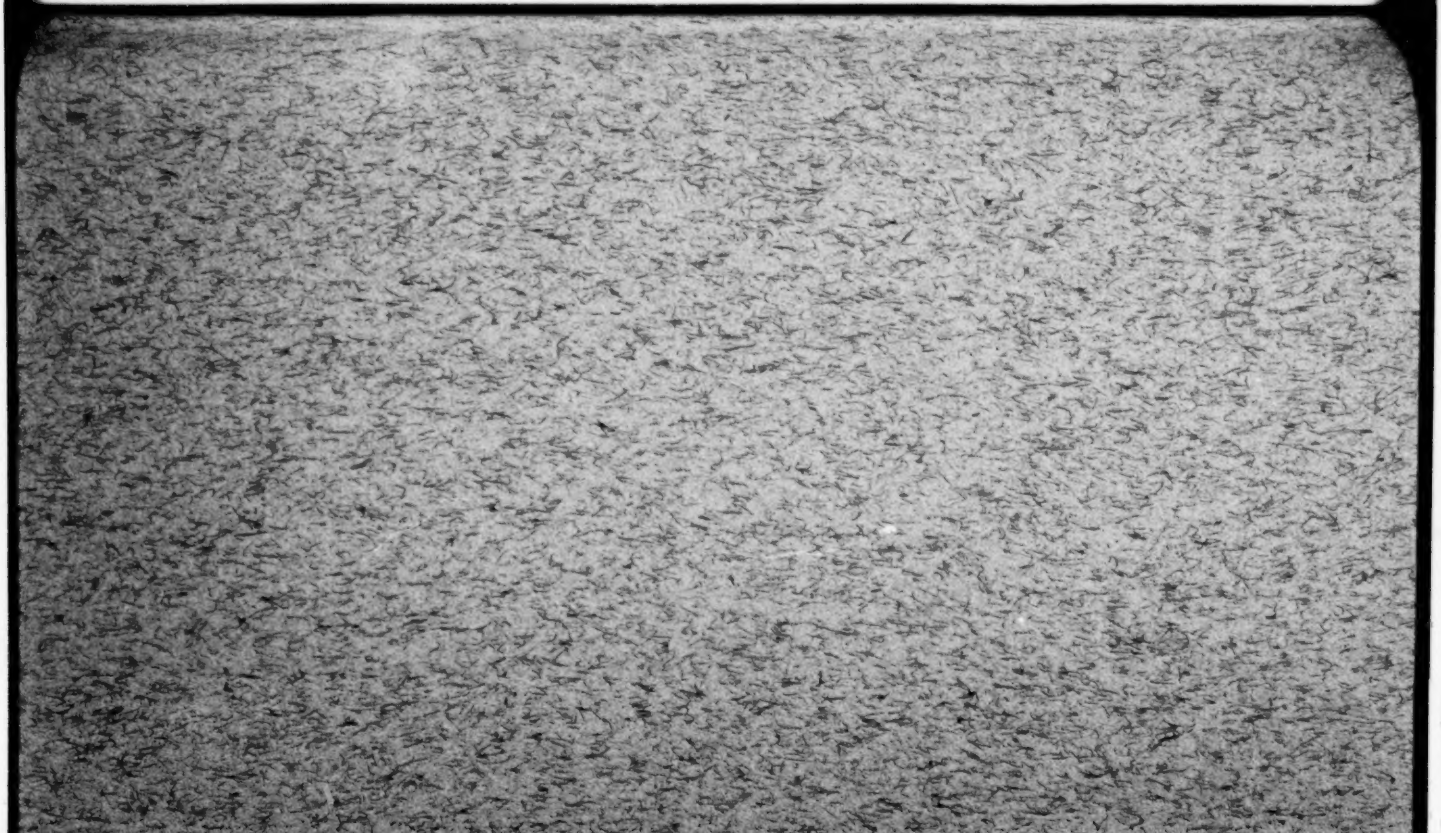

INDEX

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STATEMENT OF CASE

Kern-Limerick, Inc., operate a retail sales establishment in Little Rock, Arkansas, and have a retailers' permit as provided by the Gross Receipts Tax Law of the State. As retailers they sold the machinery to the Contractors engaged by the Navy Department to construct certain structures at the Shumaker Ordnance Plant at Shumaker, Arkansas (near Camden). The four contractors associated themselves together, in the construction contracts under the name of W.H.M.S. The contractors purchased and paid for equipment and materials to be used in its construction project under the contract to the value of $17,146.66 entailing a Gross Receipts Tax liability of $342.93. The question of the amount is not involved. The question to be determined is: Were the purchases made by the contractors or by the United States?

If the purchases were made by the contractors, Kern-Limerick owes the tax. If the purchases were made by the United States, Kern-Limerick would not owe the tax. Kern-Limerick refused to pay the tax, and following the provisions of the Arkansas Gross Receipts Tax Law (Act 386 of 1941) requested a hearing before the Arkansas Revenue Commissioner, who held the tax due, and paying the tax under protest, filed its suit in the Pulaski Chancery Court, which Court held that the tax was not due. The Commissioner appealed to the Arkansas Supreme Court, which reversed the decree of the Pulaski Chancery Court. The United States intervened in the Chancery Court case, and with Kern-Limerick has appealed from the judgment of the Arkansas Supreme Court. The Appellee, Commissioner of Revenues of Arkansas, says that the purchases were made by the Contractor, under the requirements of the contract. He says further that the Armed Services Procurement Act, Title 41 U.S.C.A., Sections 151 to 159, does not authorize the Navy Department to delegate its authority contained in said Act, to a contractor to purchase materials in the name of the United States, and bind the United States for payment. Appellee says further, the contractors were bound under the contract to furnish materials and machinery, pay for same and file its receipted bills with the Government for reimbursement for such purchases. He says further, that the whole scheme of contending that the purchases were made by the Government, rather than by the contractors, was to defeat the State in its attempt to collect its Gross Receipts Tax.

ARGUMENT

* * *

Appellee's argument is outlined as follows:

1. Contractors are taxed as consumers and are not purchasers for resale.
2. Armed Services Procurement Act does not authorize delegation of purchasing power to contractors.
3. The contract with W.H.M.S. provides that the contractor and sub-contractors purchase and pay for all material needed to fulfill the contract.

I

Contractors in Arkansas Are Taxed as Consumers

Arkansas Statutes 1947, Annotated, Sec. 84-1902 (i) is as follows:

> "(i) Consumer-User: The term 'consumer' or 'user' means the person to whom the taxable sale is made, or to whom taxable services are furnished. All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this act (§84-1901—84-1904, 84-1906—84-1919)."

Also Section 84-1903 (a) * * * and the last paragraph (e) * * * we find the following:

> "84-1903 Two per cent tax levied.—There is hereby levied an excise tax of two (2%) per centum upon the gross proceeds or gross receipts derived

from all sales to any person subsequent to the effective date of this act (§84-1901—84-1906—84-1919), of the following:

(a) Tangible Personal Property.

(e) Sales of service and tangible personal property including materials, supplies and equipment made to contractors who use same in the performance of any contract are hereby declared to be sales to consumers or users, and not sales for resale. (Acts 1941, No. 386, §3, p. 1056; 1945, No. 64, §1, p. 142.)"

It would thus seem to be certain that contractors are liable for the tax when they make the purchases.

II

The Armed Services Procurement Act Does Not Authorize Delegation of Purchasing Power to Contractors

Title 41 U.S.C.A., Sec. 156 (a) and (b) is as follows:

"Determination and Decisions (a) Powers of Agency head; Finality; Delegation. Section 156 (a). The determinations and decisions provided in this chapter to be made by the agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions in his discretion and subject to his directions, to any other officer, or officers or officials of the agency."

"'Non-Delegable power; Delegation to Chief Procurement Officer Only'. Section 156 (b). The power of the agency head to make the determinations or decisions specified in paragraphs 12 to 16 of Section 151 (c) of this title and in Section 154 (a)

of this title shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of Section 151 (c) of this title shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000."

"Assignment and Delegation of Joint Procurement Responsibilities by Agency Head; Limitations; Allocation of Appropriations. Section 159—'In order to facilitate the procurement of supplies and services by each agency for others and the joint procurement of supplies and services required by such agencies, subject to the limitations contained in Section 156 of this title, each agency head may make such assignments and delegations of procurement responsibilities within his agency as he may deem necessary or desirable, and the agency head or any of them by mutual agreement may make such assignments and delegations of procurement responsibilities within his agency as he may deem necessary or desirable, and the agency head or any of them by mutual agreement may make such assignments and delegations of procurement responsibilities from one agency to any other or to officers or civilian employees of any such agency, and may create such joint or combined offices to exercise such procurement responsibilities, as they may deem necessary or desirable. * * *'"

The authority to purchase supplies and materials under the Armed Services Procurement Act is in the main not different from the authority granted to the General Services Administration, as set out in Sections 251 to 257 of Title 41, Chapter 4 U.S.C.A. We here set out the sections dealing with the delegation of powers thereunder:

"Section 257. ADMINISTRATIVE DETERMINATIONS—
(a) Conclusiveness; Delegation of Powers.

The determinations and decisions provided in this chapter to be made by the Administrator or other agency head may be made with respect to individual purchases and contracts or with respect to classes of purchases or contracts, and shall be final. Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this chapter, including the making of such determinations and decisions, in his discretion and subject to his directions, to any other officer or officers or officials of the agency.

"NON-DELEGABLE POWERS; POWERS DELEGABLE TO CERTAIN PERSONS—(b) The power of the agency head to make the determinations or decisions specified in paragraphs 11 and 12 of Section 252 (c) of this title and in Section 255 (a) of this title shall not be delegable, and the power to make the determinations or decisions specified in paragraph 10 of Section 252 (c) of this title shall be delegable only to chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000. The power of the Administrator to make the delegations and determinations specified in Section 252 (a) of this title shall be delegable only to the Deputy Administrator or to the chief official of any principal organizational unit of the General Service Administration."

If the General Service Administration were to undertake to delegate its power to purchase to some contractor, would it not be violative of the above law? The Navy Department is authorized to purchase what it needs, and it is authorized to employ contractors as it needs, but the delegation of power to purchase, and to bind the United States, by any one, other than as designated in the Act is specifically prohibited by the Act, except as set out in the Act. And that is to some one "within his agency as he may deem necessary or desirable". The Act further provides that if the purchase is for more than $25,000 that

the power cannot be delegated to any one. Appellants here say they have delegated authority to purchase materials for construction project costing more than thirty million dollars. W.H.M.S. is not an officer of the Navy, nor of any other branch of the Armed Services.

Delegation of purchasing powers to any one not specifically authorized is forbidden. Delegation of power is limited to other agency heads, and in no instance is authority granted to delegate purchasing authority to a contractor or any other person not an officer of the agency, or some other agency. The Bureau of Yards and Docks of the Navy has simply sought to go beyond the authority granted to them in employing W.H.M.S. as a purchasing agent for the United States Government. They attempt to go even further, and designate in the contract with W.H.M.S. that their sub-contractors will be authorized to likewise be designated as purchasing agents for the Government. See paragraph (e) Article 8, page 10, printed record. It therefore means that the Prime Contractor, W.H.M.S., shall specify in each sub-contract let by them, that each sub-contractor shall act as a purchasing agent for the Government. It has been freely admitted by the Navy authorities, and by the attorney for the Government in his oral argument to the Arkansas Supreme Court that the attempt to constitute such contractors and sub-contractors as purchasing agents for the Government was to avoid the payment of Gross Receipts Tax. They not only violated the provisions of the Armed Services Procurement Act, but went out of their way to defraud the State of its tax money. See paragraph (a) page 53 of the printed record, as stated by the Arkansas Supreme Court. It was their effort to wire around the decision of this Court in the case of *Alabama* v. *King and Boozer*, 314 U.S. 1. The Arkansas Supreme Court held that their attempt to delegate W.H.M.S. with purchasing power or

designate them as purchasing agents, with their subcontractors, was ineffective under the decision of this Court in the King-Boozer case.

III

The Contract With W.H.M.S. Provides That the Contractors and Sub-Contractors Purchase and Pay for all Materials Needed to Fulfill the Contract

Article 10 (a) of the contract with W.H.M.S. is as follows:

> "COMPENSATION Article 10 (a) The Government in consideration of the strict performance by the Contractor of his covenants and agreements herein contained, shall pay to the Contractor the sum of the actual net cost, as hereinafter specified and supported by proper documents, paid by the Contractor in accordance with the provisions of this contract in the accomplishment of the work, plus the fixed-fee stated in Article 1 (b)." See page 117 of the printed record.

Article 8 (a) and (b) of the contract is as follows:

> "MATERIALS—PURCHASES Article 8 (a) Except where provision is otherwise made by the Officer-in-Charge, all materials, articles, supplies, and equipment required for the accomplishment of the work under this contract shall be furnished by the Contractor. The Contractor shall act as the purchasing agent of the government in effecting such procurement and the Government shall be directly liable to the vendors for the purchase price. The exercise of this agency is subject to the obtaining of approval in the instances and in the manner required by subparagraph (c) of this article. The Contractor shall negotiate and administer all such purchases and shall advance all payments therefor unless the Officer-in-Charge shall otherwise direct.

"(b) Title to all such materials, articles, supplies and equipment, the cost of which is reimbursable to the Contractor hereunder, shall pass directly from the vendor to the Government without vesting in the Contractor, and such title (except as to property to which the Government has obtained title at an earlier date) shall vest in the Government at the time payment is made therefor by the Government or by the Contractor or upon delivery thereof to the Government or the Contractor, whichever of said events shall first occur. This provision for passage of title shall not relieve the Contractor of any of its duties or obligations under this contract or constitute any waiver of the Government's right to absolute fulfillment of all of the terms hereof." See page 10 of the printed record.

The Contractors and sub-contractors are thus bound to "furnish" all materials and supplies necessary for the completion of the Ordnance Plant, pay for such materials, and furnish "proper documents, paid by contractor in accordance with the provisions of this contract". The obligations of the Contractor in this case is not different from the contract in the *King-Boozer* case. They were bound to furnish materials, pay for them, do the work, and upon showing proper proof be re-compensated for all such purchases, plus the fixed-fee provided for. The Supreme Court of Arkansas said in its findings, on that point as follows: "When the sale was finally made the tractors were paid for by W.H.M.S., delivered to the site of construction, and again checked and inspected by the agent. Only then, and after W.H.M.S. proved to the Government's satisfaction that the purchase price had been paid by W.H.M.S. to Kern-Limerick, Inc., did the Government reimburse W.H.M.S. We are convinced that this provision pledging the credit of the Government was not placed in the contract because of any necessity to further protect the interests of the Government, but for another purpose,

and may be considered redundant." See paragraph (a) page 53 of the printed record. On page 55 of the printed record, the Arkansas Supreme Court in determining the delegation of power as set out in Section 156 (a) and (b) of the Armed Services Procurement Act (Title 41 U.S.C.A., Section 156 (a)), said: "From the above we conclude that if power in this instance was delegable at all, it would be only to an officer or official of the Navy. Here the attempt was to delegate the power to W.H.M.S. It appears probable to us that the purchases here were to be made under paragraphs 12-16 of Section 151 (c), in which case there was no power to delegate, rather than under paragraph (10) as contended by appellees. Paragraph (10) designates "supplies and services for which it is impracticable to secure competition".

Kern-Limerick had contracted to furnish materials, pay for and construct a Thirty Million Dollar plant at Shumaker, Arkansas, and the only way they could receive pay therefor was to submit evidence that they had paid for the materials and that a certain part of the construction had been done, when the earned portion of their fee of $580,000 less 15% would be paid.

This suit is a test suit, and other assessments of tax are being held, pending final determination of this cause. The printed brief of Appellants has not been furnished to us at this time (December 14, 1953), and this brief must be given to the printer now to be ready for filing by the time required by the rules of this Court.

Appellants say in their brief that "No express authority was necessary to appoint W.H.M.S. as the Navy's purchasing agent to the extent that it was" (no printed brief to give page). We think that is an erroneous statement. The Armed Services Procurement Act specifically designated and limited the delegation of purchasing power

under the Act. It provided that such delegation must be to another Navy officer, and specially prohibits any delegation of purchasing power in purchases of over $25,000. Congress has spoken on the question very clearly, and in the face of the very plain prohibition, the Navy attempts to delegate its power to purchase. The form of purchase order used is headed "PURCHASE ORDER" then follows "Navy Department, Bureau of Yards and Docks, By: Fishback & Moore of Texas, Inc." It directs that invoices must be mailed to the Contractor, Fishback & Moore, at Camden, Arkansas, and shipment to be made to "Officer-in-Charge of Construction, (no name given) c/o Fishback & Moore". On the reverse side, the last paragraph (not in the printed record) the following statement is found: "The amount of State or local sales, use, occupational, gross receipts, or other similar taxes or license fees imposed on the vendor or vendee by reason of this transaction is $..... The vendor or vendee, as the case may be, agrees upon direction of the United States to make appropriate claim for refund and in the event of any refund, to pay the amount thereof to the United States." The Gross Receipts Tax Law of Arkansas specifically provides that sales to contractors are sales for consumption and are taxable sales, and renders the retailer (Kern-Limerick) liable for the tax. Of course the amount of the tax is passed on to the Government or any other for which the merchandise is used, and this Court has held that the tax is insignificant, and merely incidental and does not amount to "a taxing of the Government". In the case at bar, it is a question of fact as to who is the purchaser, and the Arkansas Supreme Court held that W.H.M.S. was the purchaser, and that they were, therefore, liable for the tax.

Appellant has also discussed the incidence of the tax as falling on the purchaser, and that the retailer shall

pass the tax on to the consumer. That does not aid the appellant here. Since Kern-Limerick is the seller they owe the tax whether they collect it or not. W.H.M.S. consumes the merchandise in fulfilling their contract, and it is the duty of Kern-Limerick to collect it, but whether they collect the tax or not, they owe it to the State. A reading of the Gross Receipts Tax Act (Ark. Stat. 1947, Sec. 84-1903) will show that the tax is levied "upon the gross proceeds or gross receipts derived from all sales to any person * * *". Therefore the tax was levied upon Kern-Limerick and not upon W.H.M.S. The law provides that the seller shall collect it from the buyer, but the tax is never levied against the purchaser and not the seller. Act 487 of the Acts of 1949, Arkansas' Use Tax Act, Section 5 (a) and (b) levies the Use Tax as follows:

> Ark. Stats. Ann. 1947.—"Section 84-3105. Imposition and rate of tax—Extinguishment of liability.—
>
> (a) There is hereby levied and there shall be collected from every person in this State a tax or excise for the privilege of storing, using or consuming, within the State, any article of tangible personal property, after the passage and approval of this Act (§§84-3101—84-3128), purchased for storage, use or consumption in this State at the rate of two (2%) per cent of the sales price of such property. This tax will not apply with respect to the storage, use or consumption of any article of tangible personal property purchased, produced or manufactured outside this State until the transportation of such article has finally come to rest within this State or until such article has become commingled with the general mass of property of this State. This tax shall apply to the use, storage or consumption of every article of tangible personal property, except as hereinafter provided, irrespective of whether the article or similar articles are manufactured within the State of Arkansas or are

available for purchase within the State of Arkansas, and irrespective of any other condition.

(b) Every person storing, using or consuming in this State tangible personal property purchased from a vendor shall be liable for the tax imposed by this Act (§§84-3101—84-3128), and the liability shall not be extinguished until the tax has been paid to this State, but a receipt from a vendor authorized by the Commissioner under such rules and regulations as he may prescribe to collect the tax imposed hereby, given to the purchaser in accordance with the provisions of Section 7 (§84-3107) of this Act shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer."

This would seem to do away with Appellant's argument as to the incidence of the tax controlling the liability for the tax.

It will be remembered that, beginning in 1942, soon after this Court decided the *King-Boozer* case, Congress held hearings on the question of Sales Tax Liability and Exemption of Government Contractors. H.R. 6617 was before the House Ways and Means Committee. It required several days of hearings, and the proposed enactment to exempt such contractors was never passed. Congress realizes that the States have an economic problem, and have steadfastly refused to exempt such contractors from Sales Tax liability on Government contracts generally. The Naval authorities know that, for they attended the hearings and presented arguments for the resolution to exempt contractors from the tax. A number of cases have gone up to the Courts since the *King-Boozer* case, and since those hearings, and both Congress and this Court have continued to stand by the decision in that case. The question of delegation of power to purchase by designating a contractor as purchasing agent for the Government was not raised

or discussed by this Court in the *King-Boozer* case, nor in the hearings before the House Committee of Congress. As early as 1940 there was before Congress the very question of designating Government Contractors as agents of the United States Government. Amendment No. 120 was offered to H.R. 8438, the Naval Appropriation bill, and the amendment was as follows:

> "Provided, That all contractors who enter into contracts under the authority contained in this paragraph shall, in the discretion of the Secretary of the Navy, be held to be agents of the United States for the purpose of such contracts and all purchases under such contracts shall be exempt from Federal, State and local taxes."

The amendment was defeated. See Vol. 86, Part 7, pages 7518-19 and 7527-7535, Congressional Record of 76th Congress.

In the passage of the Atomic Energy Act of 1946, 60 Stat. 765, 42 U.S.C. Sec. 1809 (b) and Sec. 9 (b), the Congress spoke again and in the following language exempted all expenditures by contractors with the Atomic Energy Commission from the liability of the Sales Tax:

> "The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, County, Municipality, or any sub-division thereof."

The language was thought to be plain and the Courts in the case of *Carson* v. *Roane-Anderson, et al,* found in 192 Tenn. 150; 239 So. (2d) 27; 342 U.S. 232, promptly held the contractors not liable for the tax. Congress has again spoken and has repealed the above provision, thus leaving such contractors liable for the tax, approved August 13, 1953, in the following language:

"Section 9 (b) of the Atomic Energy Act of 1946 is amended by striking out the last sentence thereof."

See 83 Congressional Record, 1st Session, page 3966. Recent hearings in Congress attended and participated in by proponents and opponents of such taxes, have been held and Congress has very definitely spoken, and it would seem that the authority to tax Government contractors is settled. It would also seem that the Navy officers are not willing to follow the dictates of Congress. The Atomic Energy Act is the only Congressional Act that has attempted to give immunity to such contractors, and that must end now. Liability of such contractors generally has been affirmed by a vast majority of the Sales Tax States. The shortness of time for printing Appellee's brief and the State's facilities for printing forbids our having printed the Congressional Acts above referred to as an appendix, hereto.

We submit that the judgment of the Supreme Court of Arkansas should be affirmed.

Respectfully submitted

O. T. WARD

Attorney for Appellee

SUPREME COURT OF THE UNITED STATES

No. 115.—October Term, 1953.

Kern-Limerick Inc., and United States of America, Appellants, *v.* Vance Scurlock, Commissioner of Revenues for the State of Arkansas.	On Appeal From the Supreme Court of the State of Arkansas.

[February 8, 1954.]

Mr. Justice Reed delivered the opinion of the Court.

This appeal brings here the legality of the application of the Arkansas Gross Receipts Tax Law of 1941, Ark. Stat., 1947, § 84–1901 *et seq.*, to a transaction by which certain private contractors engaged in a joint venture, abbreviated WHMS, procured in Arkansas two diesel tractors costing $17,146, for use in the construction there for the United States of a naval ammunition depot estimated to cost over thirty million dollars. The tractors were procured from Kern-Limerick, Inc., a local dealer. The circumstances of the transaction would concededly make Kern-Limerick liable for the tax if the real purchaser were not the United States.

The applicable sections of the Gross Receipts Tax Law levy an "excise tax of two (2%) per centum upon the gross proceeds or gross receipts derived from all sales to any person." § 84–1903. This is a sales tax, not a use tax.[1] It is to be paid to the Tax Commissioner by the seller, § 84–1908. He is the taxpayer, § 84–1902 (e), and "shall collect the tax levied hereby from the purchaser."

[1] *Cook* v. *Southeast Arkansas Transportation Co.*, 211 Ark. 831, 202 S. W. 2d 772.

§ 84–1908. Gross receipts derived from sales to the United States Government are exempt. § 84–1904.

The construction contract had, so far as pertinent here, the provisions as to "Materials-Purchases" which are set out in the margin.[2] It was entered into by the Department of the Navy "under the authority of Sections 2 (c)(10) and 4 (b)" of the Armed Services Procurement Act of 1947. 62 Stat. 21, 41 U. S. C. (Supp. V) § 157

[2] "Materials—Purchases. Article 8–(a) Except where provision is otherwise made by the Officer-in-Charge, all materials, articles, supplies, and equipment required for the accomplishment of the work under this contract shall be furnished by the Contractor. The Contractor shall act as the purchasing agent of the Government in effecting such procurement and the Government shall be directly liable to the vendors for the purchase price. The exercise of this agency is subject to the obtaining of approval in the instances and in the manner required by subparagraph (c) of this article. The Contractor shall negotiate and administer all such purchases and shall advance all payments therefor unless the Officer-in-Charge shall otherwise direct.

"(b) Title to all such materials, articles, supplies and equipment, the cost of which is reimbursable to the Contractor hereunder, shall pass directly from the vendor to the Government without vesting in the Contractor, and such title (except as to property to which the Government has obtained title at an earlier date) shall vest in the Government at the time payment is made therefor by the Government or the Contractor, whichever of said events shall first occur. This provision for passage of title shall not relieve the Contractor of any of its duties or obligations under this contract or constitute any waiver of the Government's right to absolute fulfillment of all of the terms hereof.

"(c) No purchase in excess of $500 shall be made hereunder without the prior written approval of the Officer-in-Charge, except that the Officer-in-Charge may, in his discretion, either reduce the limitation on the amount of any purchase which may be made without such prior approval or authorize the Contractor to make purchases in amounts not in excess of $2,500 for any one purchase without obtaining such prior approval."

These provisions were also applicable to subcontractors.

et seq. These sections authorized this cost-plus-a-fixed-fee contract by negotiation without advertising.[3]

Kern-Limerick, Inc., the seller, upon demand by the Commissioner paid under protest the amount of the sales tax and brought this action for a refund in accordance with state law. The United States intervened as under the contract any state taxes the contractor was required to pay were reimbursable to it by the Government. The Supreme Court of Arkansas held WHMS was the purchaser and the claimed tax payable by Kern-Limerick as the "seller." It denied the contention of the United States that the Government was the purchaser. It held that the Armed Services Procurement Act authorized the Navy Department "to purchase supplies or services for its own use," but did not authorize the Department "to buy nails, lumber, cement, tractors, etc., which were not to be used by the Navy but by WHMS (in this instance) to construct, as independent contractors, the Ammunition Dump." The state court further held that, even if the Department had the authority to buy the tractors, it could not, under the Procurement Act of 1947, delegate this power to WHMS. — Ark. —, 254 S. W. 2d 454.

Appellants seek reversal of the decision on the grounds that the Procurement Act authorizes this contract and

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[3] Section 2 (c) (10) provides:

"All purchases and contracts for supplies and services shall be made by advertising, as provided in section 3, except that such purchases and contracts may be negotiated by the agency head without advertising if—

. . . . . .

"(10) for supplies or services for which it is impracticable to secure competition; . . . ."

Section 4 (b) prohibits use of cost-plus-a-percentage-of-cost contracts and prescribes other operative limitations not pertinent here. All provisions required by those sections were included in the contract.

that the Arkansas tax cannot by statute or constitutionally be applied to a purchase by the United States.

The state court's interpretation of the Procurement Act to deny the Navy authority to buy supplies or equipment for the construction of an ammunition dump is, we think, too restrictive. The Act gives broad powers to the Armed Services for obtaining as cheaply and promptly as possible "purchases and contracts for supplies or services . . . for the use of any such agency or otherwise," § 2 (a), and provides:

> SEC. 9. "(b) The term 'supplies' shall mean all property except land, and shall include, by way of description and without limitation, public works, buildings, facilities, ships, floating equipment, and vessels of every character, type and description, aircraft, parts, accessories, equipment, machine tools and alteration or installation thereof." [4]

We hold that the Act allows the purchase of this machinery.

It seems to us, also, that under the Procurement Act the Armed Services may use agents, other than its own official personnel, to handle for it the detail of purchase. The contention of Arkansas which was accepted by its

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[4] S. Rep. No. 571, 80th Cong., 1st Sess., p. 21, had this to say of this language:

"To make it clear that the bill relates to all procurement by the services, except purchases with nonappropriated funds, subsection (b) of this section defines 'supplies' to include all property except land, and shall include, but without limitation, public works, buildings, facilities, ships, floating equipment, and vessels of every character, type and description, aircraft, parts, accessories, equipment, machine tools, and alteration or installation thereof. These are really examples and this section is to be construed in the broadest manner possible."

The corresponding House Report, No. 109, p. 13, omitted only the last sentence.

Supreme Court is, as we understand it, that the Procurement Act does not permit a delegation to private contractors of any authority to purchase for or pledge the credit of the United States even though these contractors have contracts for construction or supplies on a cost-plus basis. Further, it follows from the Arkansas contention, that without such statutory authority the purchase by the contractor was not for the United States but for itself. This contention is based on the language of the Procurement Act, §§ 7 (a) and (b).[5] Pursuant to § 7 (a) the Secretary of the Navy, somewhat obscurely, appears to have delegated his authority to determine the necessity for a negotiated contract to a Navy Contracting Officer asserted in the contract, without exception, to be the Chief of the Bureau of Yards and Docks. See 32 CFR §§ 400.201–5 and 402.101. That official negotiated the contract, as it stated and as is admitted by stipulation, under the authority of § 2 (c)(10) of the Procurement Act—"for supplies or services for which it is impracticable to secure competition."

Arkansas calls attention to the restrictions on delegation in § 7 (b) upon which the state court commented. But the provisions of § 7 (b), as the words show, do not

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[5] "SEC. 7. (a) . . . Except as provided in subsection (b) of this section, the agency head is authorized to delegate his powers provided by this Act, including the making of such determinations and decisions, in his discretion and subject to his direction, to any other officer or officers or officials of the agency.

"(b) The power of the agency head to make the determinations or decisions specified in paragraphs (12), (13), (14), (15), and (16) of section 2 (c) and in section 5 (a) shall not be delegable, and the power to make the determinations or decisions specified in paragraph (11) of section 2 (c) shall be delegable only to a chief officer responsible for procurement and only with respect to contracts which will not require the expenditure of more than $25,000."

Appellee also refers to § 10. As that provides only for interservice procurement, we do not think it pertinent.

cover action under § 2 (c)(10), and the section's prohibition of delegation in certain instances is inapplicable. We find nothing in the Procurement Act that bars a contract for purchase for the United States of supplies or services by private persons.

The Government asserts that §§ 4 (a) and (b) authorize this contract. Under them negotiated contracts, such as this, "may be of any type which . . . will promote the best interests of the Government." Under such a provision, it seems that the determination to use purchasing agents is permissible. Where there is no prohibition of a particular type of contract and no direction to use a particular type, the contracting officers are free to follow business practices.[6] We conclude that the Navy Department has power to negotiate contracts which provide for private purchasing agents for supplies and materials.

With this determination that the provisions of the contract are within the authority of the Procurement Act, we turn to examine the validity of the argument that the naming of the Government as purchaser was only colorable and left the contractor the real purchaser and the transaction subject to the Arkansas tax. *Alabama* v. *King & Boozer,* 314 U. S. 1, is relied upon primarily. We consider this argument under the assumption, made by the Supreme Court of Arkansas, that the contract was designed to avoid the necessity in this cost-plus contract of the ultimate payment of a state tax by the United States.

We are mindful, too, of the careful attention Congress has given in recent years to a proper adjustment of tax liabilities between the federal and the state sovereignties. Congress has been solicitous to see that states and their subdivisions are not unduly burdened by federal acquisi-

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[6] *United States* v. *Linn,* 15 Pet. 290, 316; *Muschany* v. *United States,* 324 U. S. 49, 63.

tion of property taxable by the states when otherwise held. It understands the burdens on local public agencies from the new federal installations and their accompanying personnel. Provisions deemed suitable have been made.[7] These include recent legislation designed to make independent contractors carrying on activities of the Atomic Energy Commission subject to state sales taxes.[8] But in recommending the legislation the Joint Committee on Atomic Energy, while providing for voluntary contributions, did not propose to subject Government property and purchases to state taxes. The enactment left them free.[9] This recognition of the constitutional immunity of the Federal Government from state exactions rests, of course, upon unquestioned authority. From *McCulloch* v. *Maryland*, 4 Wheat. 316, through *Gillespie* v. *Oklahoma*, 257 U. S. 501, and *New York ex rel. Rogers* v. *Graves*, 299 U. S. 401, a host of cases upheld freedom from state taxation not only for Government activities but also for the agencies and

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[7] *E. g.*, T. V. A., 16 U. S. C. § 831*l*; R. F. C., 15 U. S. C. § 607. Cf. *Dameron* v. *Brodhead*, 345 U. S. 322.

[8] 67 Stat. 575. See S. Rep. No. 694, 83d Cong., 1st Sess.

[9] Section 9 of the Atomic Energy Act of 1946, 60 Stat. 765, 42 U. S. C. § 1809 (b) as amended, provides: "In order to render financial assistance to those States and localities in which the activities of the Commission are carried on and in which the Commission has acquired property previously subject to State and local taxation, the Commission is authorized to make payments to State and local governments in lieu of property taxes. Such payments may be in the amounts, at the times, and upon the terms the Commission deems appropriate, but the Commission shall be guided by the policy of not making payments in excess of the taxes which would have been payable for such property in the condition in which it was acquired, except in cases where special burdens have been cast upon the State or local government by activities of the Commission, the Manhattan Engineer District or their agents. In any such case, any benefit accruing to the State or local government by reason of such activities shall be considered in determining the amount of the payment."

salaries of persons that carried on the work. *James* v. *Dravo Contracting Co.*, 302 U. S. 134, reviewed this judicial history, adopted for federal contractors and state taxation the reasoning that subjected a state contractor's earnings to federal income tax and upheld the state's gross receipts tax upon a federal contractor's earnings on the ground that it did not interfere "in any substantial way with the performance of federal functions." *Id.*, at 161. The question of the immunity of Government in relation to its purchases of commodities was left open. *Id.*, at 153. *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466, overruled *Rogers* v. *Graves, supra*, and *Gillespie, supra*, fell in *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U. S. 342, 365.

A phase of the question reserved in the *Dravo* case came up in *Alabama* v. *King & Boozer*, 314 U. S. 1. We declared that federal sovereignty "does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." *Id.*, at 9. That case involved the usual type sales tax on the seller, collectible by him from the buyer. There was there, too, a cost-plus-a-fixed-fee contract with the United States. We held the state tax collectible from the sellers, notwithstanding the Government bore the economic burden. A few excerpts will make clear the purport of the ruling.

> "As the sale of the lumber by King and Boozer was not for cash, the precise question is whether the Government became obligated to pay for the lumber and so was the purchaser whom the statute taxes, but for the claimed immunity. . . . The contract provided that the title to all materials and supplies for which the contractors were 'entitled to be reimbursed' should vest in the Government 'upon delivery at the site of the work or at an approved

storage site and upon inspection and acceptance in writing by the Contracting Officer.'" *Id.*, at 10.

". . . we think all the provisions which we have mentioned, read together, plainly contemplate that the contractors were to purchase in their own names and on their own credit all the materials required, unless the Government should elect to furnish them; that the Government was not to be bound by their purchase contracts, but was obligated only to reimburse the contractors when the materials purchased should be delivered, inspected and accepted at the site." *Id.*, at 11.

"But however extensively the Government may have reserved the right to restrict or control the action of the contractors in other respects, neither the reservation nor the exercise of that power gave to the contractors the status of agents of the Government to enter into contracts or to pledge its credit." *Id.*, at 13.

The contract here in issue differs in form but not in economic effect on the United States. The Nation bears the burden of the Arkansas tax as it did that of Alabama. The significant difference lies in this. Both the request for bids and the purchase order, in accordance with the contract arrangements making the contractors purchasing agents for the Government, note 2, *supra*, contain this identical, specific provision:

"3. This purchase is made by the Government. The Government shall be obligated to the Vendor for the purchase price, but the Contractor shall handle all payments hereunder on behalf of the Government. The vendor agrees to make demand or claim for payment of the purchase price from the Government by submitting an invoice to the Con-

> tractor. Title to all materials and supplies purchased hereunder shall vest in the Government directly from the Vendor. The Contractor shall not acquire title to any thereof."

The purchase order is headed Navy Department Bureau of Yards and Docks, is signed by the contractor as purchasing agent, and requires the seller to make this certification on the claim for payment:

> "'I certify that the above bill is correct and just; that payment therefor has not been received; that all statutory requirements as to American production and labor standards, and all conditions of purchase applicable to the transactions have been complied with; and that the State or local sales taxes are not included in the amounts billed.'
>
> . . . . .
>
> "In the event the Contractor is required to pay and does pay State or local sales taxes, the words 'and that State or local sales taxes are not included in the amounts billed' should be struck from the certification and the following additional certification added:
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> "'The amount of State or local sales, use, occupational, gross receipts, or other similar taxes or license fees imposed on the Vendor or Vendee by reason of this transaction is $————. The Vendor, or Vendee, as the case may be, agrees upon direction of the United States to make appropriate claim for refund and in the event of any refund, to pay the amount thereof to the United States.'"

The stipulation of facts shows in detail the course of business under this contract in the purchase of supplies and the form of this purchase. Both conform to the language of the contract in requiring specific Government approval to the purchasing agent for each request for bid and each purchase. Under these circumstances, it is clear

that the Government is the disclosed purchaser and that no liability of the purchasing agent to the seller arises from the transaction.[10]

A comment should be made about another excerpt from *King & Boozer*. It was referred to in the Arkansas opinion as though it were effective for the determination of this case. The quotation is this:

> "The soundness of this conclusion turns on the terms of the contract and the rights and obligations of the parties under it. The taxing statute, as the Alabama courts have held, makes the 'purchaser' liable for the tax to the seller, who is required 'to add to the sales price' the amount of the tax and collect it when the sales price is collected, whether the sale is for cash or on credit. Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on which only the Supreme Court of Alabama can speak with final authority." *Id.*, at 9–10.

Read literally, one might conclude this Court was saying that a state court might interpret its tax statute so as to throw tax liability where it chose, even though it arbitrarily eliminated an exempt sovereign. Such a conclusion as to the meaning of the quoted words would deny the long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest.[11] The quotation refers, we think, only to the power of the state court to determine who is re-

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[10] See *Hodgson* v. *Dexter*, 1 Cranch 345, 362; *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 703; Restatement, Agency, § 320; Williston, Contracts, § 281. Cf. *Merchants Fleet Corp.* v. *Harewood*, 281 U. S. 519, 525.

[11] *New Jersey Ins. Co.* v. *Division of Tax Appeals*, 338 U. S. 665, 674; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69, 83; *United*

sponsible under its law for payment to the state of the exaction. The formulation of the "precise question" at the first of the quotation from *King & Boozer, supra,* p. 8, indicates this.

We find that the purchaser under this contract was the United States. Thus, *King & Boozer* is not controlling for, though the Government also bore the economic burden of the state tax in that case, the legal incidence of that tax was held to fall on the independent contractor and not upon the United States.[12] The doctrice of sovereign immunity is so embedded in constitutional history and practice that this Court cannot subject the Government or its official agencies to state taxation without a clear congressional mandate. No instance of such submission is shown.

Nor do we think that the drafting of the contract by the Navy Department to conserve Government funds, if that was the purpose, changes the character of the transaction. As we have indicated, the intergovernmental submission to taxation is primarily a problem of finance and legislation. But since purchases by independent contractors of supplies for Government construc-

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States v. *Allegheny County,* 322 U. S. 174, 182; *Union Pacific R. Co.* v. *Public Service Comm'n,* 248 U. S. 67, 69. Cf. *Dyer* v. *Sims,* 341 U. S. 22, 29.

This principle covers the question of who is the "purchaser." *SRA* v. *Minnesota,* 327 U. S. 558, 564; *Metropolitan Bank* v. *United States,* 323 U. S. 454, 456; *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 483.

[12] See *Oklahoma Tax Comm'n* v. *Texas Co.,* 336 U. S. 342, 365: "True intergovernmental immunity remains for the most part. But, so far as concerns private persons claiming immunity for their ordinary business operations (even though in connection with governmental activities), no implied constitutional immunity can rest on the merely hypothetical interferences with governmental functions here asserted to sustain exemption."

tion or other activities do not have federal immunity from taxation, the form of contracts, when governmental immunity is not waived by Congress, may determine the effect of state taxation on federal agencies,[13] for decisions consistently prohibit taxes levied on the property or purchases of the Government itself.[14]

Reversed.

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[13] *Alabama* v. *King & Boozer*, 314 U. S. 1; *Carson* v. *Roane-Anderson Co.*, 324 U. S. 232; *Esso Standard Oil Co.* v. *Evans*, 345 U. S. 495.

[14] *United States* v. *Allegheny County*, 345 U. S. 495; *Mayo* v. *United States*, 319 U. S. 441; *Pittman* v. *Home Owners Corp.*, 308 U. S. 21, 31.

SUPREME COURT OF THE UNITED STATES

No. 115.—October Term, 1953.

Kern-Limerick Inc., and United States of America, Appellants, *v.* Vance Scurlock, Commissioner of Revenues for the State of Arkansas.	On Appeal From the Supreme Court of the State of Arkansas.

[February 8, 1954.]

Mr. Justice Black, with whom The Chief Justice and Mr. Justice Douglas concur, dissenting.

The Court holds that Government purchasing agents can delegate to their subordinates authority to delegate to private persons power to buy goods for the Government and pledge its credit to pay for them. *Alabama* v. *King & Boozer*, 314 U. S. 1, 13, rejected a similar contention. The Court points to no statute which either expressly or by fair implication grants any such broad delegation authority to Government agents.

Experiences through the years have caused Congress to hedge in Government purchases by many detailed safeguards such as competitive bidding after public advertising.* Due to a supposed necessity for haste, chosen Government officials have sometimes been granted temporary powers to buy supplies at their discretion. But these occasions, perhaps fortunately, have been rare, and have usually been limited to items costing little. The

*For illustrations of experience with abuse of wartime Government contracting and purchasing, see Hearings Before House Committee on Military Affairs, 74th Cong., 1st Sess., on H. R. 3 and H. R. 5293, pp. 590–616, discussing profiteering during the Revolution, the Civil War, the War with Spain, and World War I. The hearings were held on a bill to end profiteering in wartime.

Court here, however, without any clear statutory authority, makes a tremendous break with long established buying practices which embodied safeguards wisely adopted to prevent needless waste of Government money. Maybe Congress has power, though I am not sure it has, to delegate Government spending to private contractors. Even so, a purpose to have Government business handled in such a loose manner should not be attributed to Congress in the absence of much more explicit statutory language than the Court is able to cite here.

I think the Supreme Court of Arkansas was right in sustaining the State's tax on authority of *Alabama* v. *King & Boozer, supra.* The Court in effect overrules that case. In doing so it moves back in the direction of discredited tax immunities like that sustained in the case of *Gillespie* v. *Oklahoma,* 257 U. S. 501, later disapproved. I would not do that, but would sustain application of this Arkansas tax to purchases of the cost-plus-a-fixed-fee contractor and affirm the State Supreme Court's judgment.

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Mr. Justice Douglas, with whom The Chief Justice and Mr. Justice Black join, dissenting.

The Arkansas Gross Receipts Tax is laid, as the majority opinion points out, on the gross receipts from all sales to any person. Ark. Stat., 1947, § 84–1903. The Act, however, spells out the incidence of the tax in detail. "Sales of service and tangible personal property including materials, supplies and equipment made to contractors who use the same in the performance of any contract are hereby declared to be sales to consumers or users and not sales for resale." § 84–1903 (e). "The term 'consumer' or 'user' means the person to whom the taxable sale is made . . . . All contractors are deemed to be consumers or users of all tangible personal property including materials, supplies and equipment used or consumed by them in performing any contract and the sales of all such property to contractors are taxable sales within the meaning of this Act." § 84–1902 (i).

On the basis of this statutory language the Supreme Court of Arkansas held that the contractor was the "purchaser" of the tractors and that the sale involved was taxable. It seems clear that, as a matter of state law, the contractor was the "consumer" and "user" of these

tractors, whether or not the contractor would have been a purchaser in the common law view. Of course Arkansas could not impose its tax on the contractor in such a way as to discriminate against the United States. But that has not been attempted here.

What Arkansas has done is to define an independent contractor as the "consumer" or "purchaser" of tractors which the contractor uses. Obviously the contractor could be made liable for the tax, if its contract were with a private corporation rather than with the federal government. Arkansas has not tried to collect the tax from the United States, and it clearly could not do so. See *Mayo* v. *United States,* 319 U. S. 441. Arkansas has collected the tax from the "purchaser" as that word is defined by the taxing statute. That is where the *legal incidence* of the tax falls. If the *economic burden* of the tax falls on the federal government, it falls there because the government assumed it by contract, not because Arkansas placed it there. See *Curry* v. *United States,* 314 U. S. 14, 18.

The constitutional problem, of course, is to determine whether the *legal incidence* of a tax will be disregarded because the *economic burden* of the tax is on the United States. When Congress has not spoken, that determination must be made by the Court.

In *Alabama* v. *King & Boozer,* 314 U. S. 1, we allowed a sales tax to be exacted from an independent contractor acting for the government on a cost-plus-a-fixed-fee basis. That tax was measured by the value of lumber used by the contractor in performing its contract. The government exercised much the same sort of detailed control over that transaction as it did over the present one. The Court was careful to point out, in rejecting the claim of immunity, that "Who, in any particular transaction like the present, is a 'purchaser' within the meaning of the statute, is a question of state law on

which only the Supreme Court of [the State] can speak with final authority." 314 U. S., at 9–10.

In that case, however, the Supreme Court of Alabama had held the transaction immune from the tax. There was no authoritative state determination of the *legal incidence* of the tax. The Court therefore assumed, 314 U. S., at 10, that the tax fell on the "purchaser" of the lumber in the common law sense. The Court then went on to show, in answer to the same arguments which the Government has made in this case, that the United States was not a purchaser of the lumber even under common law rules. It is this segment of the opinion which the Court now uses practically to overrule the decision itself. No doubt the United States was, under some of the language used in *King & Boozer,* the "purchaser" of these two tractors. But the United States is not the "purchaser" under the language used in the Arkansas statute, and it is the Arkansas statute that controls this case. What was important in *King & Boozer* was the substance of the transaction and the nature of the economic burden on the United States. On these two paramount issues it is impossible to distinguish the present case.

The concepts "title," "agency," and "obligation to pay" are no basis for this constitutional adjudication. Today they are used to permit any government functionary to draw the constitutional line by changing a few words in a contract. When the Congress deliberates over this problem, as it often has,[1] it does not worry about the passing of title or other legal technicalities. The Congress debates whether as a matter of policy, including the need of the States for revenue, the holder of a cost-plus government contract should be immune from state taxation.

[1] See, for example, 86 Cong. Rec. 7528, 7532–7535; 88 Cong. Rec. 2835, 3464–3466, 4814; Hearings Before House Committee on Ways and Means on H. R. 6617, 77th Cong., 2d Sess. (1942).

Alabama v. *King & Boozer* and the cases it followed[2] were a long step forward from the time when a State's power to tax was nullified whenever the federal treasury was even remotely affected. We should not take this equally long step backwards. We should hold that, until the Congress says differently, the States are free to tax all sales to cost-plus government contractors. We should dispense with fruitless talk of agency, titles, and obligations to pay. The *legal incidence* of a tax is a matter for the States to determine. We should decide today, as we did more than a decade ago, that a tax on a contractor for goods he uses is constitutional, even though the *economic burden* falls on the Federal Government.

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[2] *James* v. *Dravo Contracting Co.*, 302 U. S. 134; *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466.